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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 757

THE UNITED STATES OF AMERICA, APPELLANT

v.

MILO W. BEKINS AND REED J. BEKINS, AS TRUSTEES APPOINTED BY THE WILL OF MARTIN BEKINS, DECEASED, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the United States District Court for the Southern District of California, Northern Division (R. 71)[1] is not yet reported.

JURISDICTION

A certificate was issued to the Attorney General (R. 65) and the United States intervened (R. 66–68) under the Act of August 24, 1937, c. 754, 50 Stat. 751. The judgment of the court below was

[1] Record references are to No. 772, *Lindsay-Strathmore Irrigation District* v. *Bekins et al.* The parties have stipulated that a single record would be printed in this court (R. 104). The records are identical except for the proceedings on appeal; those proceedings in No. 757 are added to the record in No. 772.

entered on December 2, 1937 (R. 89). Appeal was allowed on (R. 101).

Appellees' motion to dismiss or affirm was denied, and probable jurisdiction noted by this Court on February 28, 1938. The jurisdiction of this Court rests on Section 2 of the Act of August 24, 1937.

QUESTION PRESENTED

Whether the Act of August 16, 1937, is a valid exercise by Congress of its power "to establish * * * uniform laws on the subject of bankruptcies throughout the United States."

STATUTES INVOLVED

The Act of August 16, 1937, is set forth in the Appendix, *infra*, pp. 89–100.

STATEMENT

The Lindsay-Strathmore Irrigation District includes some 15,260 acres of land located in Tulare County, California, and is an irrigation district organized on October 25, 1915, under the California Irrigation District Act of March 31, 1897, as amended (Deering's General Laws, Act No. 3854), for the purpose of constructing, improving, maintaining, and operating irrigation projects and works devoted chiefly to the improvement of lands within its boundaries for agricultural purposes (R. 1, 5).

On September 21, 1937, the District filed a petition for confirmation of a plan for composition of its debt under Chapter 10 of the Bankruptcy Act

of August 16, 1937. It alleged insolvency by reason of its inability to meet its obligations as to two bond issues, in the aggregate amount of $1,635,000, issued by it under the provisions of the California Irrigation District Act (R. 2). The petition alleges that the low price of agricultural products prevented the landowners from paying their assessments; in 1932, when the District last attempted to collect taxes to pay bond maturities and interest, the delinquency was 47 per cent (R. 5).

Creditors owning about 87 per cent of the securities affected by the plan have agreed to the plan of composition and have consented to the filing of the petition (R. 3, 8). Under the plan the District agrees to pay in cash to the holders of the bonds 59.978 cents for each dollar of the principal amount of each bond, this will be in full payment, discharge, and satisfaction of all amounts of principal and interest due on such bonds (R. 3). The payments will be financed by a loan which the Reconstruction Finance Corporation has agreed to make to the District (R. 4).

On October 2, 1937, Milo W. Bekins, trustee, together with certain other bondholders, appellees here, moved to dismiss the petition upon the ground, among others, that Chapter 10 of the Bankruptcy Act, Sections 80–84, inclusive, is unconstitutional and void (R. 21). Similar grounds were alleged in the return to the order to show cause why the plan should not become temporarily operative (R. 25).

Exhibits to the return indicate that the creditors had on August 31, 1937, obtained a writ of mandate from the Superior Court of Tulare County, directing the County Board of Supervisors to levy and collect taxes sufficient to pay the amounts due these creditors (R. 50) and that the proceedings had been suspended by the state court (R. 55) on the return of the District (R. 52) alleging the filing of a petition in the federal bankruptcy court. One other creditor separately appeared and joined in the motion and return of these creditors (R. 24, 56). The aggregate amount of their alleged bondholding is $156,000 (R. 21–22, 24); this is 9.5 percent of the outstanding bonds of $1,635,000.

Under the provisions of the Act of August 24, 1937 (c. 754, 50 Stat. 751), the district judge certified to the Attorney General that the constitutionality of an Act of Congress was drawn in question (R. 65). The United States petitioned to intervene and defend the constitutionality of the Act (R. 66), which was allowed on November 8, 1937 (R. 68).

On November 13, 1937, the motion to dismiss was granted (R. 81); judgment was entered December 2, 1937 (R. 89). The judge felt compelled by the decision in *Ashton* v. *Cameron County District*, 298 U. S. 513, to enter this judgment, although "as a student, exercising private judgment, I agree with the conclusion of the dissenters" (R. 81).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that chapter 10 of the Bankruptcy Act, as amended by the Act of August 16, 1937, c. 657, 50 Stat. 653, is unconstitutional as applicable to the petition of the Lindsay-Strathmore Irrigation District herein.

2. In dismissing the petition of the Lindsay-Strathmore Irrigation District on the ground that chapter 10 of the Bankruptcy Act, under which the petition was filed, is unconstitutional and void.

SUMMARY OF ARGUMENT

I

The Act of August 16, 1937, adding chapter 10 to the Bankruptcy Act, is a constitutional exercise of the power "to establish uniform laws on the subject of bankruptcies throughout the United States."

A. At the time of its enactment two to three thousand municipalities, improvement districts, and other taxing agencies were in default on their obligations; many of them were hopelessly insolvent. The creditors were in an equally unfavorable position. Their only remedy, a writ of mandamus directing the collection of a tax sufficient to pay the amounts due, was wholly futile when the taxpayers were unable even to pay the normal taxes. An agreement reducing the amount of the indebtedness to a figure which the taxing agency

can pay is obviously the only solution either for the debtor or for the creditor. Yet in a large proportion of the cases minority creditors, either because of cupidity or because of obstinacy, have blocked the consummation of a plan regarded as satisfactory both by the debtor and the majority of its creditors.

Legislative authority is necessary to coerce the obdurate minority into acceptance of a satisfactory plan. This legislation is beyond the powers of the states. *Sturges* v. *Crowninshields,* 4 Wheat, 122; *Ogden* v. *Saunders,* 12 Wheat. 213. It is, therefore, plain that the urgently needed relief can be obtained only through Federal legislation.

B. Chapter X was enacted to grant this relief. The bankruptcy courts are given jurisdiction over petitions filed by improvement and school districts and by municipalities. With the petition there must be presented a plan of composition agreed to by 51 per cent of the creditors. After hearing, the judge may confirm the plan if two-thirds of the creditors have agreed, if he finds that the plan fair, and if the taxing agency is authorized by law to take the contemplated steps. The powers of the bankruptcy court do not extend to interfering with the petitioner's governmental powers or revenues, or with any control exercised by the state over the petitioner.

C. The relief of public debtors lies within the bankruptcy power. Story's conclusion that the

power may be applied to *any* debtor is supported by the meager history of this clause in the Federal Convention. It finds even more support in the expanding development which the Congress has given the bankruptcy power. As this Court has remarked, this has been a history "of progressive liberalization in respect of the operation of the bankruptcy power" which demonstrates "in a very striking way the capacity of the bankruptcy clause to meet new conditions as they have been disclosed." *Continental Bank* v. *Rock Island Railway,* 294 U. S. 648, 668, 671. Similarly, the definitions of the bankruptcy power which have been approved by this Court are of the broadest character, and describe it as relating to "any * * * class" of debtors and as relating to "the subject of any person's general inability to pay his debts."

In view of the separable application of the Act, the Court need not go beyond the question whether the bankruptcy clause can include irrigation districts. There is nothing in the public nature of these debtors which requires that they be carved out of the bankruptcy field. Certainly, the practical reasons for a bankruptcy law are peculiarly applicable to these districts, which have a large indebtedness and an uncertain income, and against which the creditors have no practicable remedy. Nor is there anything in the nature of their status as public corporations which requires their exemption from the bankruptcy power. It has long been

settled that their creditors may bring suit against them in the Federal courts, that these courts may issue mandamus to compel the collection of taxes, and, indeed, that the court may itself collect the taxes necessary to pay the plaintiff creditors if there is an analogous procedure available to creditors in the state courts. Since the general judicial power exercised under the diversity of citizenship clause extends to the debts of these taxing units, it seems perfectly plain that the debts are similarly within the judicial power when authorized by Congress under the specific bankruptcy power.

D. Because the authority of the debtor may vary according to state law does not destroy the uniformity of the Act of August 16, 1937. *Hanover National Bank* v. *Moyses,* 186 U. S. 181, 188, 190. Nor is there any substance to the objection that the creditors' claims are taken without just compensation; this is the very purpose of the bankruptcy power.

Even in cases where the debtor can file its petition only by virtue of statutory consent by the state, there is no impairment of the obligation of contracts by the state when it grants this consent. The impairment is accomplished in the bankruptcy court, and not when the state grants its consent.

II

The Act invades none of the reserved powers of the states, and is in no way inconsistent with the implications of our dual system of government.

A. The Tenth Amendment reserves to the states only "the powers *not* delegated to the United States by the Constitution." The plain meaning of this language is confirmed by the history of its adoption. Its purpose, as then expressed, was merely to declare that the central government was to be one of delegated powers. This declaration was desired to ensure (1) that the Congress would not exercise powers which had not been delegated, and (2) that the states could continue to exercise those powers which they had not granted to Congress. As Madison explained in introducing the Amendment in Congress, it is probably unnecessary "but there can be no harm in making such a declaration." That the Tenth Amendment was not to operate as an independent limitation upon the powers of Congress is made doubly plain by the deliberate rejection of proposals that all powers not "expressly" granted should be reserved to the states. As Story has said, "The attempts * * * to force upon this language an abridging or restrictive influence are utterly unfounded in any just rules of interpreting the words or the sense of the instrument."

The plain purpose of the Amendment has been conferred by more than a century of constitutional history. From Chief Justice Marshall, in *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 325 to *United States* v. *Sprague*, 282 U. S. 716, 733, the Court has repeatedly held that the Tenth Amendment adds

nothing to the Constitution. However, several recent decisions of this Court, such as *Hopkins Savings Association* v. *Clearly*, 296 U. S. 315 and *United States* v. *Butler*, 297 U. S. 1, have indicated a view that this Amendment does have some effect as an independent limitation upon the Federal power. The opinions in these cases cannot, however, be taken *sub silentio* to have overruled so important and so futile a constitutional doctrine. The accepted interpretation of the Tenth Amendment has been retained in contemporaneous decisions such as *Ashwander* v. *Tennessee Valley Association*, 297 U. S. 288.

It may be assumed that the scope of Federal powers in exceptional circumstances is limited by the implications of the dual system of the Federal government. But the first question must always be whether or not the power has in fact been granted to the national government; only then can it be determined whether or not the power has been reserved to the states as one "not delegated to the United States."

B. It is perfectly plain that the Act of August 16, 1937, is wholly consistent with our dual system of government. If there were doubt, this conclusion is affirmatively established by the Act itself.

The proceedings are wholly voluntary, and the taxing agency can file its petition only if the state consents. The court is without any control over the fiscal affairs or governmental activities of the tax-

ing agency. The power of the bankruptcy court is limited to the approval of the plan offered by the taxing agency and by two-thirds of its creditors or to its rejection. Apart from the coercion of the minority creditors, composition "is a proceeding wholly voluntary on both sides." *Cumberland Glass Co.* v. *De Witt*, 237 U. S. 447, 453. To remove all doubt, Congress has made specific requirement that the judge find that the plan is consistent with state law, that he interfere with no governmental power or revenues of the petitioner, and that nothing should be construed to limit or impair the control of the state.

Moreover, the State of California itself has authorized its taxing districts to proceed under Federal bankruptcy statutes. Appellees should not be heard to argue for a sovereign immunity which the state itself has renounced. More generally, some sixteen states have expressly sanctioned their taxing agencies to invoke the aid of the Federal bankruptcy courts. When both the national legislature and the states have concluded that the bankruptcy statute is consistent with our dual system, this Court should be slow to reject their judgment. So far as the bankruptcy power may be analogized to the taxing power, it should be noted that the consent of the state removes any objection to the application of this Act to the taxing agencies of the state.

C. *Ashton* v. *Cameron County District*, 298 U. S. 513, is inapplicable to this Act; but if the Court

thinks that ruling so broad as to cover Chapter X, it is respectfully urged that it be modified or overruled.

In this case, as in *Wright* v. *Vinton Branch,* 300 U. S. 440, 457, the considered judgment of the Congress that the constitutional objections of this Court had been overcome, gives to the Act a presumption of constitutionality of perhaps uncommon weight.

Chapter IX provided for "readjustment" of the debts of any municipality or political subdivision. The bankruptcy court could require the taxing district to submit information disclosing the conduct of its affairs. It could direct the rejection of executory contracts of the taxing district and could require the district to open its books and records to any creditor. The order of the court was binding on the taxing district as well as the creditors. None of these powers is present in chapter X. This Act is a composition act and, as this Court has often held, compositions are contractual rather than coercive so far as the debtor and its majority creditors are concerned. *Nassau Works* v. *Brightwood,* 265 U. S. 269, 271.

Moreover, the Cameron County District was held to be a political subdivision of the state; indeed, the Act was applicable only to political subdivision. Under California law, however, districts such as the Lindsay-Strathmore Districts have repeatedly been held not to have a status of a political subdi-

vision. See *Wood* v. *Imperial Irrigation District*, 216 Cal. 748, 753. The Act, accordingly, is not controlled by the *Ashton* case as it is applied in this case. Since its provisions are separable, it is unnecessary to consider whether or not it would be valid if applied to taxing agencies which were political subdivisions of the state.

It is true that the opinion in the *Ashton* case is couched in broad terms. If construed to be applicable in this case, the government respectfully asks that it be reexamined and overruled. Chapter X is necessary for the relief of taxing agencies and their creditors and it is a valid exercise of the bankruptcy power. It contains no color of interference with the affairs of the taxing agencies which voluntarily seek its benefits. The decision that it is none the less unconstitutional would have a catastrophic effect, both upon the taxing agencies and their creditors, and upon the constitutional development of the nation.

ARGUMENT

I

THE ACT OF AUGUST 16, 1937, IS A VALID EXERCISE OF THE BANKRUPTCY POWERS GRANTED TO THE CONGRESS

The sole question presented to this Court is whether the Act of August 16, 1937 (c. 657, 50 Stat. 653; U. S. C., Title 11, Secs. 81–83), adding Chapter X to the Bankruptcy Act of 1898, is a constitutional exercise of the power granted to Congress, by the fourth clause of Section 8 of Article I, "to establish * * * uniform laws on the subject of bankruptcies throughout the United States." [2]

A. The necessity for Federal legislation

1. *The need for relief.*—The Act of August 16, 1937, was enacted to remedy a situation which was near to intolerable both for the taxing agencies [3] and for their creditors.

In January 1934, when hearings on the proposed Chapter IX were held, some 2,019 municipalities,

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[2] In addition to that of the court below, decisions have been entered by two District Courts. In each case the constitutionality of Chapter X was sustained. *In re City of Fort Lauderdale, Fla.*, and *In re City of Hollywood* (S. D., Fla.), decided December 8, 1937, and *In re Drainage District No. 7 of Poinsett County, Ark.*, 21 F. Supp. 798 (E. D., Ark.).

[3] The Act enumerates, as within the term "taxing agency," various types of agricultural, local, and road improvement districts; school and port improvement districts; and municipalities (*infra*, pp. 89–90.) This case, of course, presents the constitutional question only with respect to irrigation districts.

improvement districts, and other taxing agencies were known to be in default on the principal or interest, or both, of their obligations. Since the investigation did not cover the smaller taxing units, or the taxing agencies which had not been subjected to action by their creditors, the number of actual defaults was probably much larger than this figure.[4] Estimates ran as high as 4,000 defaulting taxing units.[5] The taxing agencies in default included large cities such as Detroit, Miami, Asheville, and Mobile, as well as a host of small communities and local improvement districts; they were located in 41 of the 48 States.[6] The defaulted bonds totalled between $1,000,000,000 and $2,800,000,000.[7] The most recent figures indicate that the larger taxing units had eliminated their defaults but that some 3,079 of the smaller units remained in default on March 1, 1938.[8]

[4] Hearings before Subcommittee, Committee on the Judiciary, Senate (S. 1868 and H. R. 5950), 73d Cong., 2d Sess., p. 12.

[5] *Relief for State Subdivisions*, 33 Col. Law Rev. 1050.

[6] Senate Hearings, 73d Cong., *supra*, p. 12.

[7] *Relief for State Subdivisions*, 33 Col. Law Rev. 1050; *Legislative Aid to Creditors of Political Subdivisions*, 46 Harv. Law Rev. 1317; Securities and Exchange Commission, Report on Protective Committees, Part IV, p. 1; Hearings, Senate Committee on Banking and Currency on S. 3255, 75th Cong., 3d Sess., p. 128.

[8] Senate Hearings, 75th Cong., *supra*, p. 128; Summary of Municipal Debt Defaults as of March 1, 1938, BOND BUYER; see also Hearings before Subcommittee on Bankruptcy and Reorganization, Committee on the Judiciary (H. R. 2505, 2506, 5403, 5969), 75th Cong., 1st Sess., p. 18.

The Congressional hearings and debates contain many instances of hopelessly insolvent taxing agencies. For example, a Florida city in 1925 paved streets, installed sewers, etc., for a population of 15,000 to 20,000 people; after the collapse, only half a dozen families remained to enjoy these improvements and a per capita indebtedness of $11,000.[9] A Texas water improvement district had a bonded indebtedness of $100 per acre, to be paid by assessments against lands valued at $75 per acre.[10] Another Florida community was directed by mandamus to levy and collect taxes amounting to 49 per cent of the assessed value of the property, in order to meet the interest and regularly maturing principal on its outstanding bond issues for a single year.[11] Not all of the defaulting taxing agencies, of course, are in so desperate a condition. But respondents hardly will deny that many hundreds of these taxing agencies will never be able to pay more than a small fraction of the face value of their outstanding bonds.

Such hope as these communities might have to regain a normal degree of well-being is blocked by the over-indebtedness itself. Property owners, of course, will not improve their land, while residents and industries alike will avoid the district, if there is an ever-present threat of confiscatory tax levies

[9] House Hearings, 75th Cong., *supra*, p. 122.
[10] 81 Cong. Rec. 6313.
[11] House Hearings, 75th Cong., *supra*, pp. 20–21.

to pay outstanding bonds the amount of which approaches or exceeds the value of the property.[12]

Nor is the position of the creditors any more favorable. The taxing agency has no property against which a judgment can be executed; the taxpayers are not personally liable for the debts of the agency. The only practicable remedy for the bondholder is to obtain a writ of mandamus, directing the tax officials to collect a tax sufficient to pay the amounts due.[13] But, where there has already been a default, the tax is so large in relation to his means that it simply cannot be collected from the typical property owner. This, in turn, will require that the property be sold for taxes. The property must be offered in distress sales, and after one to five years of delay. Tax delinquency in such a situation is wide-spread, so many properties must be sold at about the same time. The imminence of further bond defaults, with their possible consequence of further disproportionate tax levies, must discourage purchasers still further. The taxing agency must often buy in the property itself at the tax sales, with the result that the property goes off the tax rolls entirely. In result, the creditor finds his position not materially bettered as a result of his mandamus action. It serves to protect cred-

[12] House Hearings, 75th Cong., *supra*, p. 23; Securities and Exchange Commission, Report, *supra*, Part IV, p. 12.

[13] The authorities are collected in Fordham, *Methods of Enforcing Obligations of Public Corporations*, 33 Col. Law Rev. 28.

itors against willful defaults, but is next to worthless in the case of the taxing agency which is incapable of meeting its obligations.[14]

The only escape from the impasse is for the taxing agency and its creditors to come to an agreement which reduces the indebtedness to an amount which can be paid.[15] This procedure will ordinarily result in a substantially greater return to the creditors, and will avoid the expenses and delays of compulsory tax collection, and the dispossession of property owners. Generally speaking, it is entirely feasible to come to an agreement which is mutually satisfactory both to the taxing agency and to the great majority of its creditors. But in almost every case a small minority of the creditors will block the plan. In many cases the minority creditor seeks to establish a nuisance value for his consent; by refusing to agree to the plan, and by threatening mandamus action, he may, with sufficient obduracy, be able to secure payment of his claim in full. In other cases, the minority creditors may have some *bona fide* objection to the plan which is not shared by his fellow creditors. In either case, the desire

[14] House Hearings, 75th Cong., *supra*, pp. 20–21; Senate Hearings, 73d Cong., *supra*, pp. 22–23; Securities and Exchange Commission Report, *supra*, pp. 19–24.

[15] There is precedent for an equity proceeding on a creditor's bill, in which the annual revenues are apportioned among the creditors. See *infra*, pp. 39–40, and *George* v. *City of Asheville*, 80 F. (2d) 50 (C. C. A. 4th); *Norfolk & W. Ry.* v. *Board*, 14 F. Supp. 475 (N. D., Ill.). This

of the taxing agency and the great bulk of its creditors to contrive a solution for an intolerable situation has effectually been frustrated.[16]

The obvious need is for legislative authority to compel the minority bondholders to accept a reasonable adjustment of the indebtedness of the taxing agency. This was the chief effect of Chapter IX during its two years of operation. Only about 108 petitions were filed under the Act; of these only 47 were approved and only 5 proceeded to final decree.[17] Yet many times this number of taxing agencies were able to arrange their affairs merely because of the existence of the legislation. The minority creditors, realizing that they would be forced to agree to a reasonable plan worked out be-

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proceeding, however, does not scale down the indebtedness and means simply that the litigation must continue indefinitely. See House Hearings, 75th Cong., *supra*, pp. 85–86.

[16] The hearings are filled with protests against the tyranny exercised by minority creditors. For example, a settlement of one Florida town, agreed to by creditors owning 98 per cent of its bonds, was defeated by a mandamus action brought by the remaining creditors. (House Hearings, 75th Cong., *supra*, p. 21.) An Arkansas drainage district had similarly secured the consent of creditors owning 96 per cent of its bonds but could not proceed without some protection against the minority (*id.*, 85, 115–116). An Alabama town reached an agreement with creditors holding $950,000 of its bonds; it was upset by a suit brought by a creditor owning the remaining $2,000 of bonds. Senate Hearings, 73d Cong., *supra*, pp. 14–15. See also S. E. C. Report, *supra*, pp. 28–30.

[17] House Hearings, 75th Cong., *supra*, pp. 143–144.

tween the taxing agency and its majority creditors, typically did not object.[18]

In result, many hundreds of taxing agencies were in serious default, and, in many cases, were hopelessly insolvent. Their creditors, in practical terms, were helpless. The community could gain a fresh start, and the creditors could salvage a part of their investment, only if a mutually acceptable agreement could be worked out.[19] In the great majority of cases a small minority of the creditors, either because of cupidity or because of obstinacy, blocked the agreement. The only answer to an intolerable situation was legislative authority to compel the minority creditors to accept a plan regarded as satisfactory by the majority.

2. *The states cannot act.*—Given this compelling need for legislative action, the next inquiry must

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[18] House Hearings, 75th Cong., *supra*, pp. 22, 124; 81 Cong. Rec. 6318. In Florida, for example, 50 to 75 taxing agencies are said to have worked out a plan of debt adjustment while only about half a dozen petitions were actually filed under Chapter IX (Hearings, p. 124).

[19] It is significant in this connection that the Act of May 12, 1933, c. 25, 48 Stat. 31, Section 36, as amended, authorizes the Reconstruction Finance Corporation to make loans, not to exceed a total of $125,000,000 to any agricultural improvement district for the purpose of refinancing its indebtedness. About $60,000,000 has been authorized to be loaned to about 250 districts; in most cases completion of the refinancing will be impossible without the aid of Chapter X. House Hearings, 75th Cong., *supra*, pp. 44–45.

be whether, under the Constitution, the state or the nation is the more appropriate government. To this there can be but one answer.

The minority creditors ordinarily can be compelled to accept the plan desired by the majority only through the operation of bankruptcy or insolvency legislation. Though compare *Doty* v. *Love*, 295 U. S. 64. The states have power to enact such legislation, so long as it is outside the field of the federal bankruptcy laws. But such bankruptcy legislation cannot, under the contracts clause, constitutionally be applied to contracts entered into before its passage. *Sturges* v. *Crowninshield*, 4 Wheat. 122; *Baldwin* v. *Hale*, 1 Wall 223, 228; *Brown* v. *Smart*, 145 U. S. 454, 457; *International Shoe Co.* v. *Pinkus*, 278 U. S. 261, 263–264. Nor can state bankruptcy laws operate extraterritorially to discharge debts due to creditors resident in other states. *Ogden* v. *Saunders*, 12 Wheat. 213; *Baldwin* v. *Hale*, *supra*, 231–234; *Gilman* v. *Lockwood*, 4 Wall. 409, 410–411; *Denny* v. *Bennett*, 128 U. S. 489, 497–498; *Brown* v. *Smart*, *supra*, 457; *Stellwagen* v. *Clum*, 245 U. S. 605, 615; *International Shoe Co.* v. *Pinkus*, *supra*, 263–264.

Each of these powers which the Constitution denies to the states is necessary if the insolvency legislation is to be effective to compel minority creditors to accept the terms of a reasonable plan. It is, accordingly, clear that the overburdened taxing

agencies and their creditors stand in urgent need of relief through federal legislation.[20]

B. The Act of August 16, 1937

This relief Congress has sought to grant in the Act of August 16, 1937 (reprinted in the Appendix, *infra*). It adds Chapter X to the Bankruptcy Act and provides, in substance, a procedure by which the taxing agency and its majority creditors may agree on a plan and compel its acceptance by the minority.

Section 81 gives to bankruptcy courts original jurisdiction of proceedings for the composition of the indebtedness of taxing agencies which is payable out of taxes or assessments which are liens against property or the income from the sale of water or power. These agencies include such of the following organizations as may constitutionally proceed in bankruptcy: (1) agricultural improvement districts; (2) sanitary and paving districts; (3) road improvement districts; (4) school districts; (5) port improvement districts; and (6) cities, towns, and other municipalities.

The composition procedure is provided in Section 83. Subdivision (a) authorizes a petition to be filed by any taxing agency (defined as the peti-

[20] In *Pryor* v. *Goza*, 172 Miss. 46 (1935), the court held a state bankruptcy act for the relief of drainage districts invalid because of the contracts clause of the Federal Constitution.

tioner in Section 82) which is insolvent or unable to meet its debts as they mature. A plan of composition, agreed to by not less than 51 per cent of the creditors affected, must be filed with the petition, together with the names and addresses of all known creditors. The judge, if satisfied that the petition complies with Chapter X and is filed in good faith, shall approve it as properly filed; if not satisfied, he shall dismiss it. The plan of composition may modify the rights of creditors generally, or of any class.

Subdivision (b) requires published and mailed notice of the proceedings and directs that a hearing be held. Any creditor may file objections to the plan. On notice by any creditor to the petitioner, the judge may dismiss the proceeding because not conducted with reasonable diligence or because it is unlikely to be accepted by sufficient creditors. At the hearing the judge shall decide the issues presented, and shall dismiss the petition unless its allegations are sustained.

Subdivision (c) authorizes the judge to stay any suits against the petitioner or its officers or inhabitants based on the securities affected by the plan. The judge may enter an interlocutory order making the plan of composition temporarily operative.

Subdivision (d) directs that the plan of composition shall not be confirmed unless it has been accepted in writing by creditors holding at least two-

thirds of the aggregate amount of all claims subject to modification by the plan.

Subdivision (e) requires that the judge make findings of fact and conclusions of law as to the issues raised at the hearing. He shall enter an interlocutory decree confirming the plan if satisfied (1) that it is fair, equitable, and for the best interests of the creditors, (2) that it complies with the provisions of Chapter X, (3) that it has been accepted by two-thirds of the creditors, (4) that all amounts to be paid as expenses incident to the composition have been disclosed and are reasonable, (5) that the offer and acceptance of the plan are in good faith, and (6) that the petitioner is authorized by law to carry out the plan. The plan may be modified prior to its confirmation, after hearing, and subject to the withdrawal of any creditor adversely affected. Either party may appeal from the interlocutory decree.

Subdivision (f) provides that after deposit of the money or securities, the court shall enter a final decree, binding all creditors and discharging the petitioner from all debts dealt with in the plan except as therein provided.

Section 84 provides that no court shall exercise the jurisdiction conferred by Section 81 after June 30, 1940, except in proceedings initiated prior thereto.

C. The Act is within the bankruptcy power

It seems unlikely that there will be any challenge to the Act of August 16, 1937, as lying outside the bankruptcy power except that which is based upon the nature of the debtor. The purpose of the Act, the nature of the proceedings and the effect of the decree are substantially equivalent to the familiar provisions for composition of debts and for bankruptcy reorganizations. There can, therefore, be no real question but that the Act, in its basic respects, is well within the limits of the congressional power to legislate "on the subject of bankruptcies." *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648, 667–675. That case also answers any objection based upon the fact that the proceedings do not look to the liquidation of the debtor's assets. There is, similarly, no ground for any objection that the surrender of property to the court is necessary for the exercise of bankruptcy jurisdiction. *Vulcan Sheet Metal Co.* v. *North Platte Val. Irr. Co.*, 220 Fed. 106, 108 (C. C. A. 8th); *In re Hirsch*, 97 Fed. 571, 573 (S. D., N. Y.); *In re J. M. Ceballos & Co.*, 161 Fed. 445, 450 (D., N. J.). The only remaining question is whether the bankruptcy power extends to a public corporation, such as the Lindsay-Strathmore Irrigation District, as well as to private persons. As to this there is, we submit, equally little doubt.

1. The bankruptcy clause was introduced toward the close of the Constitutional Convention [21] and occasioned no comment or explanation beyond that of Gouverneur Morris, to the effect that "this was an extensive and delicate subject." [22] The Federalist is equally terse, saying merely that the power is so intimately connected with the regulation of commerce "that the expediency of it seems not likely to be drawn in question." (No. 42, Madison.) It may, however, be noted that, in ratifying the Constitution, the New York Convention proposed an amendment which would have restricted the bankruptcy clause to merchants and traders.[23] The rejection of this proposal indicates, as Morris said, that the bankruptcy power was intended to embrace an "extensive" subject.

Story (Constitution, II, secs. 1106–1114), emphatically pictures the desirability of giving the

[21] On August 29, 1787, Pinckney proposed that Congress be given the power "To establish uniform laws upon the subject of bankruptcies, and respecting the damages arising on the protest of foreign bills of exchange." Farrand, Records of the Federal Convention, II, 447.

[22] This was in reply to Sherman, who did not desire to give Congress a power to punish bankrupts by death, as was in some cases done by the laws of England. There was no further debate, and the clause was adopted by a vote of 9–1. Farrand, II, 489.

[23] "That the power of Congress to pass uniform laws concerning bankruptcy shall only extend to merchants and other traders; and the states, respectively, may pass laws for the relief of other insolvent debtors." Elliot's Debates, I, 330.

bankruptcy power to the Federal government. "A national government which did not possess this power would be little worthy of the exalted functions of guarding the happiness and supporting the rights of a free people" (sec. 1106). He does not, of course, discuss the applicability of the bankruptcy power to public debtors. But there seems to be little question that he would view an act for their relief as well within the bankruptcy field. After noting that the English laws were confined to traders, he continues (sec. 1113):

> But this is a mere matter of policy, and by no means enters into the nature of such laws. There is nothing in the nature or reason of such laws to prevent their being applied to any other class of unfortunate and meritorious debtors.

2. The constitutional development of the bankruptcy clause shows with considerable clarity that it extends to *any* debtor who cannot meet his obligations.[24] There have been Federal bankruptcy statutes in force during 1800–1803, 1841–1843, 1867–1878, and since 1898. Each period marks an expansion of the concept of bankruptcy.

Although the English Act was confined to traders (*Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648, 670), the Act of April 4, 1800, c. 19, 2 Stat. 19, applied to "any merchant, or other person * * * actually using the trade of merchandise, by * * *

[24] The background of this development is well summarized in Warren, Bankruptcy in United States History.

dealing in exchange, or as a banker, broker, factor, underwriter or marine insurer." The Act of August 19, 1841, c. 9, 5 Stat. 440, not only introduced the novel principle of voluntary bankruptcy, but extended it to "all persons whatsoever * * * owing debts which shall not have been created of a defalcation" in a public or a fiduciary position. The Act of March 2, 1867, c. 176, 14 Stat. 517, permitted a voluntary petition to be filed by "any person" who was a resident, who had provable debts over three hundred dollars, and who would take an oath of allegiance to the United States (Sec. 11). The Act was also applicable to partnerships and to "all moneyed business or commercial corporations and joint stock companies"; the petitions could be voluntary or involuntary, but, since the business concerns could secure no discharge, the proceeding was solely for the purpose of liquidation (secs. 36, 37). The Act of June 22, 1874, c. 390, 18 Stat. 178, amending the 1867 Act, for the first time permitted the debtor to propose a plan of composition with his creditors, either before or after an adjudication of bankruptcy, which would be effective when those holding two-thirds of the claims accepted it (sec. 17). The Act of July 1, 1898, c. 541, 30 Stat. 544, permitted any natural person to file a voluntary petition of bankruptcy and authorized involuntary proceedings against natural persons who were not wage-earners or farmers, against unincorporated companies, partnerships and private bankers, and

against corporations "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits" (secs. 4, 5).

Recent amendments to the Bankruptcy Act have permitted reorganization or readjustment proceedings, in contrast to the traditional liquidation proceedings, "for the relief of debtors." The Act of March 3, 1933, c. 204, 47 Stat. 1467, permits a natural person to file a petition for a composition or for an extension of time to pay his debts (sec. 74). Special provisions are made for farmers (sec. 75). A new class of debtors is brought in by Section 77, under which railroad corporations may file a petition for reorganization. The Act of June 7, 1934, c. 424, 48 Stat. 911, adds Section 77B, which permits any corporation covered by Section 4 of the 1898 Act, and any transportation corporation not covered by Section 77, to file a petition for reorganization.

This steadily expanding field of legislation under the bankruptcy clause has been well summarized by this Court in *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648, 668, 671:

> From the begining, the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect of the operation of the bankruptcy power.
>
> * * * * *
>
> The fundamental and radically progressive nature of these extensions becomes ap-

> parent upon their mere statement; but all have been judicially approved or accepted as falling within the power conferred by the bankruptcy clause of the Constitution. Taken altogether, they demonstrate in a very striking way the capacity of the bankruptcy clause to meet new conditions as they have been disclosed as a result of the tremendous growth of business and development of human activities from 1800 to the present day. And these acts, far-reaching though they be, have not gone beyond the limit of congressional power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed.

See, also, *Louisville Bank* v. *Radford,* 295 U. S. 555, 587–588; *Adair* v. *Bank of America Association;* No. 365, October Term, 1937 (pamph., p. 3). It is plain that the bankruptcy power has, with the approval of this Court, been exercised with respect to "practically all insolvent debtors" (*Louisville Bank* v. *Radford, supra,* 588), and to "practically all classes of persons and corporations" (*Continental Bank* v. *Rock Island Ry., supra,* 670). Respondent must, we submit, show compelling reasons why this ever-widening exercise of the bankruptcy power must come to an abrupt halt when Congress extends the benefits of the bankruptcy law to a new class of debtors, the taxing agencies specified in the Act of August 16, 1937.

3. Certainly there is nothing in the concept of bankruptcy, as it has been formulated by this

Court, which would require the exclusion of these public debtors such as the Lindsay-Strathmore Irrigation District. In *Hanover National Bank* v. *Moyses,* 186 U. S. 181, the Court sustained the Act of July 1, 1898, against a constitutional attack which included the objection that it extended to others than traders. Chief Justice Fuller referred to the dictum of Justice Livingston, in *Adams* v. *Storey,* 1 Paine, 79, "that it may well be doubted" whether a bankruptcy act extending "to every description of persons within the United States would comport with the spirit" of the bankruptcy powers, and replied, "But this doubt has been resolved otherwise" (p. 184). The Court, instead, approved Story's statement (*supra,* p. 27) that "there is nothing in the nature or reason of such laws to prevent their being applied to any other class of unfortunate and meritorious debtors" (p. 185).

The other definitions of the bankruptcy power which have been formulated or approved by this Court are equally broad. Chief Justice Marshall, in *Sturges* v. *Crowninshield,* 4 Wheat. 122, 195, forecast the development of the succeeding century when he said that "it is not easy to say who must be excluded from, or may be included within, this description. It is, like every other part of the subject, one upon which the legislature may exercise an extensive discretion." Justice Catron, sitting in *In re Klein* (C. C. Mo., reported in a note to *Nelson* v. *Carland,* 1 How. 265, 277), formulated a

broad principle which has twice been quoted and approved by this Court.[25] He said (p. 281):

> [The subject of bankruptcies] extends to all cases where the law causes to be distributed, the property of the debtor among his creditors: this is its least limit. Its greatest, is a discharge of the debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of congress.
>
> With the policy of a law, letting in all classes, others as well as traders; and permitting the bankrupt to come in voluntarily, and be discharged without the consent of his creditors, the courts have no concern; it belongs to the law-makers.

Judge Cowen, in *Kunzler* v. *Kohaus,* 5 Hill. 317, 321, in a broad definition which has been approved and quoted by this Court[26] said that the bankruptcy power authorized Congress "to establish uniform laws on the subject of any person's general inability to pay his debts * * *." Judge Blatchford, in *In re Reiman,* Fed. Cas. No. 11673, in another statement which has been approved and quoted by this Court,[27] said (p. 496) that the subject of bank-

[25] *Hanover National Bank* v. *Moyses,* 186 U. S. 181, 186; *Louisville Bank* v. *Radford,* 295 U. S. 555, 588.

[26] *Continental Bank* v. *Rock Island Ry.,* 294 U. S. 648, 670; *Hanover National Bank* v. *Moyses,* 186 U. S. 181, 187.

[27] *Continental Bank* v. *Rock Island Ry.,* 294 U. S. 648, 672–673; *Louisville Bank* v. *Radford,* 295 U. S. 555, 588; *Hanover National Bank* v. *Moyses,* 186 U. S. 181, 187.

ruptcy cannot properly be defined as "anything less than the subject of the relations of an insolvent or non-paying or fraudulent debtor, and his creditors, extending to his and their relief." See, also, *United States* v. *Pusey,* Fed. Cas. No. 16098.

This Court has, on these occasions, pointed out the broad scope of the bankruptcy powers. No definition of those powers and no decision of this Court has ever indicated that the nature of bankruptcy did not extend to debtors of every class. The only requirement has been that there be a debtor and that he be unable to meet his obligations. Whether the debtor be private or public, an individual or an organization, is wholly immaterial. So long as the debtor be unable to pay his debts, both he and his creditors may be made the subject of the power of Congress to provide relief.

4. Respondents must, therefore, rest their claim solely on the proposition that something in the nature of the public debtors specified in Section 81 carves them out of the field of the bankruptcy power. The Government submits that any such contention ignores both the reason for the bankruptcy power and the nature of the taxing agencies enumerated in Section 81.

In limine, the question whether or not the bankruptcy power extends to the indebtedness of the States themselves may be put to one side. Apart from the effect of the Eleventh Amendment upon involuntary proceedings, there is reason to believe

that, if only the State have an indebtedness which it cannot pay, the sovereign aspects of the state government are irrelevant to the bankruptcy power. Congress has been granted a "plenary power over the whole subject of bankruptcies." *Hanover National Bank* v. *Moyses,* 186 U. S. 181, 187. This power "is unrestricted and paramount," such that even nonconflicting state regulation of the subject is inoperative. *International Shoe Co.* v. *Pinkus,* 278 U. S. 261, 265. The tax lien of a state "must yield to the requirements of bankruptcy administration." *Van Huffel* v. *Harkelrode,* 284 U. S. 225, 228. This Court has barred a tardy claim for state taxes because "The federal government possesses supreme power in respect of bankruptcies. * * * If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power." *New York* v. *Irving Trust Co.,* 288 U. S. 329, 333. The bankruptcy power thus is akin to the commerce power, which overrides contracts which the states may have made, *New York* v. *United States,* 257 U. S. 591; *United States* v. *Village of Hubbard,* 266 U. S. 474, and may be applied in direct regulation of the states themselves, *United States* v. *California,* 297 U. S. 175; *Board of Trustees* v. *United States,* 289 U. S. 48. But it is unnecessary to consider this question. The Act of August 16, 1937, does not confer jurisdiction over the indebtedness of a state; indeed, even counties and parishes are excluded from its operation. It is

a familiar and basic principle of constitutional law that the Court will not decide constitutional questions unnecessarily. *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners,* 113 U. S. 33, 39; *Cincinnati* v. *Vester,* 281 U. S. 439, 448–449; *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 355. Much less will it pass upon the validity of an act which has not been enacted and which none has even suggested should be enacted.

For the same reasons, this is not an appropriate case in which to consider the validity of the Act of August 16, 1937, as applied to the sixth classification of Section 81: "any city, town, village, borough, township, or other municipality." This classification is immediately followed by the following proviso:

> That if any provision of this chapter, or the application thereof to any such taxing agency or district or class thereof or to any circumstance, is held invalid, the remainder of the chapter, or the application of such provision to any other or different taxing agency or district or class thereof or to any other or different circumstances, shall not be affected by such holding.

It is plain beyond argument that, even if the Act should be thought to go beyond the bankruptcy power in Section 81 (6), the application of the Act to the Lindsay-Strathmore Irrigation District would be wholly separable from any application of the Act to municipalities, and therefore would be

entirely unaffected by any decision of invalidity with respect to the sixth subdivision of Section 81. This Court, accordingly, will not in this case consider the validity of extending the bankruptcy power to municipalities. See *Kay* v. *United States,* No. 61, October Term, 1937. The narrow question for decision is whether the federal bankruptcy power extends to irrigation districts such as the District before this Court.

In the first place, it is to be observed that the reasons for a bankruptcy law, and thus for the powers given to Congress, are peculiarly applicable to public debtors of this nature. They are organized for the sole purpose of erecting and operating costly projects to improve agricultural lands. The projects may often include unproductive land, incapable of bearing its share of the cost.[28] The revenues of the district are derived chiefly from taxes or assessments against the lands. The taxpayers, when faced by a sudden decline in the value of their agricultural products, or when their lands are ravished by drought or flood, cannot pay the taxes.[29] If delinquency occurs, the assessments on the paying lands must be increased and even more tax-

[28] *Irrigation District Operation and Finance*, Bulletin 1177, U. S. Department of Agriculture (1923), pp. 6–7.

[29] *Loans for the Relief of Drainage and Irrigation Districts*, House Rep. No. 37, 72d Cong., 1st Sess., pp. 3–4. *Economic Survey of Certain Irrigation Projects*, Hearings before House Committee on Irrigation and Reclamation, March 6, 1930, 71st Cong., 2d Sess., *passim.*

payers, unable to meet the higher rates, will stop paying altogether. As we have shown, when default occurs, the creditors are generally without a practicable remedy: there can be no execution against the property of the district and mandamus actions to compel the collection of additional taxes are futile. The only practicable solution is to reduce the indebtedness to an amount which the district can pay. Unless there be legislation compelling agreement by minority creditors, no voluntary contract can accomplish this end. For this the Federal bankruptcy power is necessary (*Supra,* pp. 14–22.)

Thus not only is there present the basic reason for any bankruptcy law—the debtor's inability to pay his debts—but there is an additional factor not ordinarily present: the creditors' incapacity effectively to realize whatever proportion of the indebtedness the debtor can in fact pay. These factors are intensified by reason of the relatively large indebtedness and uncertain income which are typically found in agricultural improvement districts.

There is, then, nothing in the actual operation of agricultural improvement districts which suggests that the bankruptcy power of the United States might not reach to their debts. The only remaining ground for exempting these districts relates to their status as corporations to which certain of the governmental powers of the State have been given.

The Lindsay-Strathmore Irrigation District is organized under the California law of March 31, 1897, as amended (Deering's General Laws, Art. No. 3854). It is clear that it is organized for a "public purpose" (*Houck* v. *Little River District*, 239 U. S. 254, 261) and that it possesses certain governmental powers and characteristics, notably the power to impose special assessments and the election of its officers by the residents generally.[30] For these reasons, the California courts describe it as a "public corporation" or a "public agency." On the other hand, it is equally plain that the District in no sense shares the sovereignty of the state, and that its governmental powers are limited solely to the purpose of agricultural irrigation for which it was organized. The California courts, accordingly, have repeatedly refused to give these districts the status of a "political subdivision" of the State. These matters are more fully treated in a subsequent part of this brief (*infra*, pp. 83–85).

Here, it is immaterial whether the District be said to have more of the characteristics of government or of a private corporation.[31] For it seems

[30] Similarly, private public utilities serve an equally public purpose and one possessed of comparable governmental powers, such as eminent domain.

[31] The commentators, it may be noted, draw a clear distinction between the municipal corporation, with general governmental powers, and the improvement district, with its narrowly limited power. See McQuillan, Municipal Corporations, I, Sec. 135; Dillon, Municipal Corporations, I, secs. 37, 38; and cases there collected.

well established that the federal courts have full power to adjudicate and control the relations between districts of this nature and their creditors.

It has long been settled that all of the subordinate organizations of the states, even though full "political subdivisions," are subject to suit in the federal courts, notwithstanding the terms of the Eleventh Amendment and notwithstanding state statutes restricting suit against them to the state courts. *Lincoln County* v. *Luning,* 133 U. S. 529. Not only may the creditors bring suit on their bonds, but this Court has repeatedly held that the federal courts might issue a writ of mandamus to compel the officials of the political subdivision or district to collect taxes sufficient to pay the debt due to the plaintiff. *Board of Commissioners* v. *Aspinwall,* 24 How. 376; *Supervisors* v. *United States,* 4 Wall. 435; *Von Hoffman* v. *City of Quincy,* 4 Wall. 535; *City of Galena* v. *Amy,* 5 Wall. 705; *Walkley* v. *City of Muscatine,* 6 Wall. 481.

In the absence of statute authorizing analogous proceedings in the state courts, mandamus rather than an equity receivership is the appropriate course. *Rees* v. *City of Watertown,* 19 Wall. 107; *Meriwether* v. *Garrett,* 102 U. S. 472; *Thompson* v. *Allen County,* 115 U. S. 550; *Yost* v. *Dallas County,* 236 U. S. 50. But it is also settled that the federal court may itself collect the taxes necessary to pay the plaintiff creditors if there be an analogous procedure available to creditors in the state courts.

In *Supervisors* v. *Rogers*, 7 Wall. 175, the Court affirmed an order appointing the marshal of the court a commission to levy taxes sufficient to satisfy the judgment against the county; authority was found (p. 180) in the state mandamus statute, authorizing the state courts to appoint persons to discharge any duties which an officer refused to perform in obedience to a writ of mandamus. In *Guardian Savings Co.* v. *Road District*, 267 U. S. 1, the court affirmed a decree of the district court which appointed a receiver to collect taxes necessary to pay principal and interest on the outstanding bonds because a similar power was given the state chancery court; the cause of the default, it may be noted, was a decree of the state court enjoining the District from paying the money (267 U. S. at 5). See, also, *Mercantile Trust Co.* v. *Road District*, sustaining the claim of a mortgage trustee for compensation out of the proceeds of a similar collection of taxes by "foreclosure" in the federal court of the mortgaged assessments. The lower courts have similarly, in equity suits, directed their receivers or officers to collect taxes necessary to pay creditors of the political subdivision or district.[32]

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[32] *Stansell* v. *Levee District No. 1*, 13 Fed. 846, 852 (N. D., Miss.) and *Campbellsville Lumber Co.* v. *Hubbert*, 112 Fed. 718, 721 (C. C. A. 6th), each approved by this Court in *Guardian Savings Co.* v. *Road District*, *supra*; *Kotchtitsky* v. *Mercantile Trust Co.*, 16 F. (2d) 227 (C. C. A. 8th); *Duval Cattle Co.* v. *Hemphill*, 41 F. (2d) 433, 438 (C. C. A. 5th); *Krietmeyer* v. *Baldwin Drainage District*, 298 Fed.

It is clear that the federal courts have entertained little hesitation in subjecting both political subdivisions and taxing districts to federal judicial process on behalf of the plaintiff creditor. Wholly apart from any federal statute, involuntary suits may be brought against the taxing agency, while Chapter X authorizes only voluntary proceedings. Mandamus will issue to compel the debtor to collect taxes, while Chapter X denies any control over the petitioning taxing agency. Indeed, the federal courts have themselves collected the taxes, while Chapter X allows it to do no more than confirm an agreement reached between the taxing agency and two-thirds or more of its creditors.

It necessarily follows that there is nothing in the nature of the taxing agencies specified in Section 81 which excludes their debts from the reach of the federal judicial power. And if they are subject to the general judicial power granted in "controversies * * * between citizens of different states," these debts are obviously subject to the judicial power when authorized by Congress under the specific power to legislate on "the subject of bankruptcies."

5. The meager *indicia* that have been found as to the intention of the framers, the expanding history of the powers exercised by Congress under the

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604 (S. D., Fla.); see *Drainage District No. 2* v. *Mercantile-Commerce Bank*, 69 F. (2d) 138, 140 (C. C. A. 8th); cf. *George* v. *City of Asheville*, 80 F. (2d) 50 (C. C. A. 4th).

bankruptcy clause, the definitions which this Court has approved of "the subject of bankruptcies," and the jurisdiction which the federal courts have long exercised with regard to the indebtedness of state taxing agencies, alike serve to demonstrate that the Act of August 16, 1937, falls well within the bankruptcy powers granted to Congress by the Constitution.

This conclusion is confirmed by the two opinions in which this Court has had occasion to consider bankruptcy acts for the relief of public debtors. In *Ashton* v. *Cameron County District,* 298 U. S. 513, this Court held invalid the Act of May 24, 1934, adding Chapter IX to the Bankruptcy Act. The decision, however, was placed on the ground that Chapter IX was inconsistent with the sovereign rights of the states. The Court said (p. 527):

> * * * we assume for this discussion that the enactment is adequately related to the general "subject of bankruptcies." See *Hanover National Bank* v. *Moyses,* 186 U. S. 181; *Continental Illinois N. B. & I. Co.* v. *C., R. I. & P. Ry. Co.,* 294 U. S. 648; *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555.

Again, in *Adair* v. *Bank of America Association,* No. 365, October Term, 1937, the Court cited the Act of August 16, 1937, as illustrative of the "progressive liberalization of bankruptcy and insolvency laws" (pamph., p. 3).

Neither of these cases, of course, is a decision on the question, but each is significant as indicative of the ordinarily accepted connotations of "the subject of bankruptcies." Proceedings for the relief of the public debtors specified in Section 81 cannot, we submit, be held to be outside the federal bankruptcy powers unless the constitutional grant of power is to be sharply curtailed, in striking contrast to the broad and expanding development the bankruptcy clause has received both from Congress and from this Court.

D. The Act violates no limitation of the bankruptcy power

Appellees, in their return to the order to show cause why an injunction should not issue (R. 29–30) and in their motion to dismiss the proceeding (R. 22–23) also object that the Act of August 16, 1937, is not a "uniform" law on the subject of bankruptcy, and that it violates the Fifth Amendment in that it takes property without just compensation. Neither objection has substance.

1. *The Act is "uniform."*—The Act of August 16, 1937, contains no geographical or sectional discrimination or classification. The manner in which it operates differently in one place than in another is as a result of different state laws. For example, the taxing agencies of one state might be authorized to proceed under Chapter X while those of another state might not. Again, the details of the plans adopted may vary from state to state accord-

ing as the taxing agencies have authority to take steps of one kind or another in execution of the plan of composition.

It is quite plain that any such variation does not destroy the uniform operation of the federal law. The Act of July 1, 1898, contained several analogous variations: for example, the exemptions allowed the bankrupt, dower rights, and priority of payments, each turned upon the local law of the bankrupt's state. This Court in *Hanover National Bank* v. *Moyses,* 186 U. S. 181, held that these provisions did not infringe the requirement that bankruptcy laws be uniform. It said (pp. 188, 190):

> The laws passed on the subject must, however, be uniform throughout the United States, but that uniformity is geographical and not personal, * * *.
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> * * * * *
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> We * * * hold that the system is, in the constitutional sense, uniform throughout the United States, when the trustee takes in each State whatever would have been available to the creditors if the bankrupt law had not been passed. The general operation of the law is uniform, although it may result in certain particulars differently in different States.

That ruling is controlling here: the federal law is uniform even though its application will in some respects vary according to local law, just as it

varies from case to case according, *inter alia,* to the amount of the debts and resources of the debtor.

2. *The Act does not violate the Fifth Amendment.*—Appellees object that their property is taken without just compensation by the Act of August 16, 1937. The provisions of the actual plan proposed by the District and its majority creditors are, of course, not before the Court on this appeal. Appellees' objection, therefore, seems to relate only to the broad purpose of the Act to compel minority creditors to accept a plan of readjustment which involves a reduction in the amount of their claims against the debtor taxing agency.

But this object is the very purpose and the heart of the bankruptcy power. If the creditor's claim could not so be "taken" in the proceeding, the bankruptcy power would be a complete nullity and every discharge or confirmation, under any part of the Bankruptcy Act, would violate constitutional rights.

3. *There is no violation of the contracts clause.*—Appellees seem not to object that proceedings under this act result in an impairment of their contracts. However, it was suggested by the Court in *Ashton* v. *Cameron County District,* 298 U. S. 513, 531, that, so far as the State granted permission to its taxing agencies to proceed in bankruptcy, it impaired the obligation of contracts. This objection, of course, can relate only to proceedings in the states where express authorization was necessary

for the public debtor to petition the bankruptcy court; the failure of a state to restrict the powers of the taxing agency hardly could be said to be an impairment of the obligation of contracts.

The Government submits that this suggestion is unfounded. The State consent does not impair the obligation of any contract. The impairment is accomplished in the bankruptcy court, and is the guiding purpose of the bankruptcy proceedings. Whether or not the consent is necessary for the taxing agency to proceed, the contract rights of the creditors are readjusted only in bankruptcy and not by the action of the state.[33] The consent of the state is irrelevant to the rights of the creditors; it serves only to waive any objection which *the state* might have to the bankruptcy proceedings.

In *Hanover National Bank* v. *Moyses,* 186 U. S. 181, 188–190, the Court sustained the power of Congress to grant to the bankrupts the exemptions given by state law. None has had the temerity to argue that, in prescribing the amount of property which the creditors could not reach, the state impaired the obligation of contracts, even though it is plain that the creditor's realization in the bankruptcy court was in part dependent upon the bankrupt's exemptions.

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[33] The tariff imposed upon the importation of scientific instruments, considered in *Board of Trustees* v. *United States*, 289 U. S. 48, was imposed only because the State of Illinois authorized their purchase and importation; this did not make the tariff charge a forbidden import duty laid by the State.

II

THE ACT OF AUGUST 16, 1937, DOES NOT INVADE THE RESERVED POWERS OF THE STATES

It has been shown that the Act of August 16, 1937, is an exercise of the bankruptcy powers of the Federal Government and that, apart from any effect of the Tenth Amendment, it violates no constitutional limitation. The only remaining question is whether it is to be declared invalid because, under the Tenth Amendment, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The original act for the relief of State taxing districts (May 24, 1934, c. 345, 48 Stat. 798; U. S. C., Title 11, c. IX) was held invalid on this or an analagous ground in *Ashton* v. *Cameron County District*, 298 U. S. 513. The Government submits: (a) the Tenth Amendment has no application to powers which are delegated to the Federal Government; (b) the Act of August 16, 1937, infringes no sovereign powers of the States; and (c) the *Ashton* case is inapplicable here or, alternatively, should be overruled.

A. The Tenth Amendment does not restrict the powers granted to the Federal Government

If, as we have shown, the bankruptcy powers granted to Congress by Article I, Section 8, clause 4 include the power to provide for composition of the debts of state taxing agencies, no further question can be raised under the Tenth Amendment.

That Amendment has no independent operation. It reserves to the states only "the powers *not* delegated to the United States by the Constitution." Language could not be clearer.

The plain meaning of this Amendment is bulwarked both by the circumstances of its adoption and the decisions of this Court.

1. The first ten amendments are a close adaptation of those proposed by Massachusetts in ratifying the Constitution.[34] At that time four States had ratified the new Constitution; the opposition was strong and becoming increasingly vocal in the states yet to act. The omission of a bill of rights was generally regarded as the most vulnerable point in the proposed charter.[35] John Hancock, president of the Massachusetts Convention, accordingly introduced the proposed amendments "in order to remove the doubts and quiet the apprehensions of gentlemen" (Elliot's Debates, II, 123). John Adams welcomed the proposal with enthusiasm; it would allay doubts, conciliate opposition and serve to ease the path of ratification in the eight states which had not acted. Stillman considered them "peace-makers" (Elliot, II, 123–124, 169). These predictions were fulfilled. South Carolina,

[34] The first of the nine recommendations of Massachusetts read: "That it be explicitly declared that all powers not expressly delegated by the aforesaid Constitution are reserved to the several states, to be by them exercised" (Elliot's Debates, I, 322).

[35] Warren, The Making of the Constitution, p. 769.

New Hampshire, Virginia and New York each ratified the Constitution but expressed their earnest hope for amendments; only the North Carolina convention insisted upon amendments prior to ratification.[36]

The discussion in the ratifying conventions confirms the plain meaning of the words of the Tenth Amendment, and indicates that the proponents wished merely to insure that the central government would be one of delegated powers. In Massachusetts Adams stated that the proposed amendment "removes a doubt which many have entertained" and made sure that "if any law made by the federal government shall be extended beyond the power granted by the proposed Constitution," it would be held unconstitutional (Elliot's Debates, II, 131). Jarvis agreed as to the desirability of the proposal, to "remove every doubt on this head" (*id.*, II, 153). In Virginia, Grayson thought, since there was a similar clause in the Articles of Confederation, it could not be "totally unneces-

[36] Elliot's Debates, I, 325–332. It may be noted that only in Massachusetts and New Hampshire was the Tenth Amendment offered as an amendment (Elliot, I, 322, 326); in South Carolina, Virginia, and New York it was set forth as declaratory of the conventions' understanding of the construction of the Constitution (*id.*, I, 325, 327). Maryland ratified without attaching proposed amendments, but its convention addressed a statement to the people of that State, explaining that the Constitution was "very defective", and recommending various amendments, including one similar to the Tenth Amendment (*id.* II, 547, 550).

sary" (*id.*, III, 449). Mason agreed, since the amendment would "remove our apprehensions" (*id.*, III, 442). Bloodworth, in North Carolina, urged the amendment because "every possible precaution should be taken when we grant powers" (*id.*, IV, 167). The delegates who opposed the amendment did so largely on the ground that it was unnecessary, if not dangerous.[37]

The anxiety for this declaratory rule of construction may be traced to two fears: that the national government might assert the right to exercise powers not granted, and that the states would be unable fully to exercise the powers which the Constitution had not taken from them. The first fear may be exemplified by Bloodworth of North Carolina, who warned that "without the most express restrictions, Congress may trample on your rights" (Elliot, IV, 167). So, too, Patrick Henry inveighed against the surrender of powers to the national government "without check, limitation, or control" (*id.*, III, 446). But perhaps the most frequently expressed purpose was to insure that the states should continue able to exercise the numerous powers which had *not* been granted to Congress. Grayson of Virginia "thought it questionable whether rights not given up were reserved"

[37] Massachusetts: Varnum (Elliot, II, 78); Virginia: Nicholas, Randolph and Madison, (*id.*, III, 450, 464, 600, 620, 626); North Carolina: Maclaine and Iredell (*id.*, IV, 140, 149); South Carolina: Pinckney (*id.*, IV, 315–316); Pennsylvania: Wilson and M'Kean (*id.*, II, 435–436, 540).

(*id.*, III, 449). Henry of Virginia thought ratification of the unamended constitution "the most absurd thing to mankind that ever the world saw—a government that has abandoned all its powers" (*id.*, III, 446). Mason of Virginia asked, "Is there any thing in this Constitution which secures to the states the powers which are said to be retained?" (*id.*, III, 441).[28]

When the proposed amendments were introduced by Madison in the first Congress, "to give satisfaction to the doubting part of our fellow-citizens" (1 Annals of Congress 432), he viewed the Tenth Amendment as merely declaratory (1 Annals 441):

> I find, from looking into the amendments proposed by the State conventions, that several are particularly anxious that it should be declared in the Constitution, that the powers not therein delegated should be reserved to the several States. Perhaps other words may define this more precisely than the whole of the instrument now does. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated. I am sure I understand it so, and do therefore propose it.

[28] For the possible convenience of the Court, citations to additional discussion of the proposals which became the Tenth Amendment are: Elliot's Debates, II, 153, 540; III, 464, 588, 589, 622.

There was no other explanatory statement in the briefly recorded debate on this Amendment. But Madison in the course of debate on Hamilton's bank proposal, on February 2, 1791, when nine states had ratified the amendments which he had proposed, said (2 Annals 1897):

> Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might evercise it, although it should interfere with the laws, or even the Constitution of the States.

Finally, any possibility of doubt must be removed when it is remembered that the adoption of the Tenth Amendment was accompanied by a deliberate refusal to reserve to the states all powers not "expressly" granted to the national government. This was the wording of Article II of the Articles of Confederation,[39] of the Massachusetts [40] and New Hampshire [41] proposals, of the South Carolina declaration,[42] and of the Maryland conven-

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[39] "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States * * *."

[40] See footnote 34, *supra*.

[41] "That it be explicitly declared that all powers not expressly and particularly delegated by the aforesaid Constitution are reserved to the several states, to be by them exercised" (Elliot, I, 326).

[42] "This Convention doth also declare, that no section or paragraph of the said Constitution warrants a construc-

tion's statement to its electors.[44] New York referred to powers "clearly" delegated.[45] Only Virginia, in its declaration, made no such qualification.[46] While Madison's proposals for new amendments were under consideration in Congress, Tucker and Gerry each moved to amend this proposal so as to reserve to the states the powers not *expressly* delegated; each motion was defeated (1 Annals of Congress 761, 767–768). Even the original reservation in the Articles of Confederation of powers not "expressly" delegated, it is to be noted, was intended by the Continental Congress to do more than to preserve the autonomy of the states.[47] Whether or not a reservation to the states of powers not expressly delegated would have impaired the last clause of Section 8 of Article I,

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tion that the states do not retain every power not expressly relinquished by them, and vested in the general government of the Union" (*id.*, I, 325).

[44] "That Congress shall exercise no power but what is expressly delegated by this Constitution" (*id.*, II, 550).

[45] "* * * that every power, jurisdiction, and right, which is not by the said Constitution clearly delegated to the Congress * * * remains to the people * * * or to their respective state governments * * *" (*id.*, I, 327).

[46] "* * * that every power not granted thereby remains with them [the people] * * *" (*id.*, I, 327).

[47] Thomas Burke, writing to Governor Caswell from the Congress, on May 23, 1777, said the proposal originally "expressed only a reservation of the power of regulating the internal police, and consequently resigned every other power. It appeared to me that this was not what the States expected, and, I thought, it left it in the power of the

granting "necessary and proper" powers, it is plain that there was a deliberate choice of the Congress to except from the reservation to the states the powers granted to Congress by implication. This choice cannot be squared with any argument that appropriate federal powers cannot be exercised because of the operation of the Tenth Amendment.

In summary, the men who proposed the Tenth Amendment seem to have been clear that the Amendment was simply declaratory of the evident proposition that Congress could not constitutionally exercise powers not granted to it, and that these powers could continue to be exercised by the states. It was designed solely to allay extravagant fears such as those of Spencer of North Carolina who felt that a clause as innocuous as that relating to the election of senators and representatives "strikes at the very existence of the states, and supersedes the necessity of having them at all" (Elliot's Debates, IV, 55). As Story has emphatically said (Story on the Constitution, secs. 1907–1908):

> This amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the Constitution. * * *

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future Congress * * * to make their own power as unlimited as they please." Burke accordingly proposed the Article which, after two days of spirited debate, was adopted 11–1, with one state divided. 7 Journals of Cont. Cong. 122–123.

> It is plain, therefore, that it could not have been the intention of the framers of this amendment to give it effect as an abridgement of any of the powers granted under the Constitution, whether they are express or implied, direct or incidental. Its sole design is to exclude any interpretation by which other powers should be assumed beyond those which are granted. * * * The attempts then which have been made from time to time to force upon this language an abridging or restrictive influence are utterly unfounded in any just rules of interpreting the words or the sense of the instrument. Stripped of the ingenious disguises in which they are clothed, they are neither more nor less than attempts to foist into the text the word "expressly," to qualify what is general, and obscure what is clear and defined. * * *

2. The plain purpose of the Amendment has been confirmed by more than a century of constitutional history. The decisions by this Court have reiterated that the Tenth Amendment offers no independent limitation upon the powers granted to the United States but merely states the unquestioned principle that the central government is one of enumerated powers.

The effect of the Tenth Amendment seems to have been considered for the first time in *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 325, where the Court said the principle, that "the sovereign powers vested in the state governments * * * re-

mained unaltered and unimpaired, except so far as they were granted to the government of the United States", had been "positively recognized" by the Amendment. Even Luther Martin, Attorney-General of Maryland, arguing in *McCulloch* v. *Maryland,* 4 Wheat. 316, conceded that the Amendment meant what it said, that it was "merely declaratory of the sense of the people" and designed to allay an apprehension which the federalists "treated as a dream of distempered jealousy" (4 Wheat. at 372, 374). Chief Justice Marshall's opinion agreed that the Amendment "was framed for the purpose of quieting the excessive jealousies which had been excited" and that it left open the question "whether the particular power * * * has been delegated to the one government, or prohibited to the other" (4 Wheat. at 405, 406). Taney, as well, accepted this self-evident proposition. In *Gordon* v. *United States,* 117 U. S. 697, 705 (1864), he said: "The reservation to the States respectively can only mean the reservation of the rights of sovereignty * * * which they had not parted from."

This Court has continued to treat the Tenth Amendment as containing no limitation on the powers granted to the United States. In the *Lottery Case,* 188 U. S. 321, 357, it brushed aside the suggestion that this Amendment forbade the legislation because "the answer is that the power to regulate commerce among the States has been expressly delegated to Congress." In *Northern Se-*

curities Co. v. *United States,* 193 U. S. 197, 344–345, the majority opinion refused to entertain argument based on the Tenth Amendment which the defendants "strangely enough" raised; it could not "conceive how it was possible for any one to seriously contend" that the commerce power was limited by the state power to charter corporations.[47] The Court, speaking of the National Prohibition Act, in *Everard's Breweries* v. *Day,* 265 U. S. 545, 558, said, "if the act is within the power confided to Congress, the Tenth Amendment, by its very terms, has no application, since it only reserves to the States 'powers not delegated to the United States by the Constitution'." In *Missouri* v. *Holland,* 252 U. S. 416, 432, the Court said that, to answer the question as to the validity of the Migratory Bird Treaty and act in view of the rights reserved to the States, "it is not enough to refer to the Tenth Amendment * * * because * * * the power to make treaties is delegated expressly * * *." Again, in *United States* v. *Sprague,* 282 U. S. 716, 733, this Court said: "The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted * * *. It added nothing to the instrument as originally ratified * * *."

[47] Only four justices joined in this opinion; the concurring opinion of Justice Brewer seems not to have gone so far. 193 U. S. at 363.

These cases show a consistent [48] and express recognition that the Tenth Amendment means just what it says. However, the clarity of these decisions has been obscured by several of the recent opinions of this Court. Thus, in *Hopkins Savings Association* v. *Cleary*, 296 U. S. 315, the Court held (pp. 338–339) that "The destruction of associations established by a state is not an exercise of power reasonably necessary for the maintenance by the central government of other associations created by itself in furtherance of kindred aims."

[48] We are not here concerned with the ebb and flow of the "states' rights" doctrine (summarized in Corwin, *The Commerce Power versus States Rights*), but with those cases in which the Court has considered the specific application of the Tenth Amendment to powers assumed to have been granted to the national government. None seems to have viewed it as an independent limitation. *Collector* v. *Day*, 11 Wall. 113, relies upon the Tenth Amendment but the decision seems to have been placed ultimately upon the supposed scope of the federal taxing power. In *Kansas* v. *Colorado*, 206 U. S. 46, 89–90, the Court rejected the argument of the United States that powers not delegated to it could be exercised if they were beyond the competence of the states: the Tenth Amendment, "seemingly adopted with a prescience of just such contention" made "absolutely certain" that the national government should not "attempt to exercise powers which had not been granted." In *Hammer* v. *Dagenhart*, 247 U. S. 251, the Court placed reliance on the Tenth Amendment but this seems to have been done merely to supplement the determination of "the controlling question for decision," which was whether it is "within the authority of Congress in regulating commerce among the States to prohibit the transportation in interstate commerce of" goods manufactured with child labor (p. 269).

This seems to be a construction of the federal powers; as such there need be no quarrel with it. But the opinion appears to view this conclusion as based upon the Tenth Amendment, independently of the scope of the powers granted to the United States (pp. 335, 336). In *United States* v. *Butler*, 297 U. S. 1, the Court held that the Agricultural Adjustment Act tax was not a true tax, because they were earmarked for benefit contracts (p. 61), and that the payments to farmers were not merely expenditures under the general welfare clause, because coupled with coercive conditions in effect regulating agricultural production (pp. 71, 73). Having reached these conclusions, the decision might appropriately have been that the Act lay outside the federal powers. But the opinion seems to decide that, "wholly apart 'from the scope of the general welfare clause,' the act invades the reserved rights of the states" (p. 68). Similarly, in *Ashton* v. *Cameron County District*, 298 U. S. 513, 527, the Court held Chapter IX of the Bankruptcy Act invalid, not because the bankruptcy power did not extend to the public debtors there specified, but because, if the Act were sustained, "the sovereignty of the State, so often declared necessary to the federal system, does not exist" (p. 531).[49] Indeed, the

[49] The decision is not in terms placed upon the Tenth Amendment. But its analysis seems basically similar to the other cases, in that the scope of the federal power was considered largely irrelevant and the validity of the Act was judged solely on the basis of the powers taken to be reserved to the States.

opinion assumes "that the enactment is adequately related to the general 'subject of bankruptcies'" (p. 527). Finally, in *Steward Machine Co.* v. *Davis,* 301 U. S. 548, and *Helvering* v. *Davis,* 301 U. S. 619, the Court sustained Titles IX, VIII, and II of the Social Security Act in opinions which not only held the titles within the powers granted to the federal government but in addition held that they did not violate the Tenth Amendment. The circumstances relied upon to show the latter conclusion might, by the traditional analysis, more appropriately have served to show that the Titles were a valid exercise of the federal power to tax and to spend for the general welfare.[50]

In none of these opinions did the Court explicitly announce a departure from its historic treatment of the Tenth Amendment. The Government does not believe that, merely because of implications derived from the form in which these opinions have been cast, so important a constitutional doctrine should be taken to have been overruled *sub silentio.* Particularly is this the case when other, and contemporaneous, decisions retain the accepted interpretation of the Tenth Amendment. In *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, the Court refused to consider

[50] A somewhat similar approach may be indicated in *Cincinnati Soap Co.* v. *United States,* 301 U. S. 308, 312, where the Court said "The Tenth Amendment is without application, since the powers of the several states are not invaded or involved."

objections raised under the Tenth Amendment to the sale of power by the Government. It said (pp. 330–331): "To the extent that the power of disposition is thus expressly conferred, it is manifest that the Tenth Amendment is not applicable * * *. The question is as to the scope of the grant and whether there are inherent limitations * * *." In *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, and in *Associated Press* v. *Labor Board*, 301 U. S. 103, the Court, having determined the National Labor Relations Act as applied to be an exercise of the commerce power, found it unnecessary even to discuss the Tenth Amendment.[51] Similarly, in *Sonzinsky* v. *United States*, 300 U. S. 506, the Court saw no occasion to consider petitioner's argument based on the Tenth Amendment (p. 508), but contented itself with the decision that the firearms tax was an exercise of the taxing power. Finally, in *United States* v. *California*, 297 U. S. 175, 184, the Court declared, in a slightly different connection, that "the sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government."

3. In none of these recent cases has the Government presented any detailed analysis of the origin

[51] The effect of the Tenth Amendment was urged by the dissenting opinion in the *Jones & Laughlin* case (301 U. S. at 97) and by respondents in the *Associated Press* case (301 U. S. at 105), in *Labor Board* v. *Freuhauf Co.*, 301 U. S. 49, 51, and in *Labor Board* v. *Clothing Co.*, 301 U. S. 58, 71.

of the Tenth Amendment or of the decisions under it; in none has a considered or detailed argument been offered in support of the position contrary to that of the Government; in none has the Court expressly considered the basis for its occasional assumption that the Tenth Amendment operates as an independent limitation upon the federal powers. Certainly, if this Court is to abandon its traditional position, in apparent disregard of the intention of the framers, the importance of the question requires that this choice should not be made without full discussion.

The argument of appellees, so far as it is based on the Tenth Amendment, must of necessity begin with the premise that the power in question is reserved to the states alone and therefore cannot be exercised or affected by the central government. This, it is to be noted, assumes that the scope and existence of an exclusive state power can be determined without reference to the federal powers. This assumption is contradicted by the whole course of our constitutional history. If a given power is reserved to the states alone, it is only because it is not delegated to the national government. The Constitution, with minor exceptions, contains no affirmative grant of exclusive power to the states. To determine the existence of the federal power by first inquiring if it is reserved to the states presents the fallacy of *petitio principii* in its most patent form. Judgment upon the scope of the federal

power cannot fail to be clouded if the issue, in part or in whole, be resolved in advance by the assumption that the same or a related power belongs affirmatively or exclusively to the States. Recognition of the importance of protecting the independence of the States would thus imperceptibly be transmuted into vitiation of powers which have in fact been granted to the Federal Government.

Appellees, we anticipate, will not argue that there is any attribute of the debts of taxing agencies of the State which means that they are inherently immune from governmental power as such. The only difficulty rests in the nature of our federal system. This, at least, must be the premise of the argument based on the Tenth Amendment. But it has been shown that the states are, under the Constitution, incompetent to provide effective bankruptcy or insolvency proceedings for their taxing agencies and subdivisions (*supra,* pp. 20–22). Neither the Tenth Amendment nor the implications of our dual system can be thought to forbid the Federal Government to exercise proper governmental powers which are apparently delegated to the United States and which the Constitution forbids to the states. Any such conclusion has the thoroughly shocking premise that, in the process of distributing appropriate governmental powers between the local and the national governments, some powers were accidentally and irretrievably lost. It seems to need no argument to demonstrate

that any such contention must fall of its own weight: the Constitution was designed to establish a more effective government, not to cripple or to destroy the governmental powers of both the states and the nation.

Indeed, the Tenth Amendment was designed to *prevent* just such evaporation of governmental power as it is here contended to require (*supra*, pp. 50–51). The present Act contemplates an exercise of the federal bankruptcy power and, in conjunction, the simultaneous operation, either tacitly or by express enactment, of state law authorizing the taxing agency to proceed. Cf. *Chicago Title Co.* v. *4136 Wilcox Corp.*, No. 23, this Term. To hold that state and nation may not thus cooperate would be doubly to offend against the Tenth Amendment. It would deny to the Federal Government a power which clearly has not been reserved to the states, and, at the same time, deny to the state a power which, by the very hypothesis of the decision, would be held not to have been granted to the United States.

The constitutional grant of federal power is, then, the measure of the power granted—not some hypothetical reservation of a specific power to the states. This principle of constitutional interpretation, which is a part of our dual system of government, is in no way inconsistent with such a system. Thus, the fact that ours is a federated system of government may have a bearing in resolving difficult questions of construction as to the

scope of a granted power. This consideration, for example, underlies the decisions of this Court that the federal government may not, under the pretext of exercising a delegated power, exercise powers not granted to it. As the Court said in the *Ashwander* case (297 U. S. at 338):

> we may assume that it [federal action] must be consistent with the foundation principles of our dual system of government and must not be contrived to govern the concerns reserved to the States. See *Kansas* v. *Colorado, supra.*

See, also, *McCulloch* v. *Maryland,* 4 Wheat. 316, 423; *Child Labor Tax Case,* 259 U. S. 20, 39. Again, as in the present case, the denial of a specific power to the states should be a weighty factor in determining whether or not the power in question has been granted to the federal government. Still another principle has developed in cases dealing with the scope of the federal taxing power, in which it has been held that the power may not be used so as to destroy or burden the essential instrumentalities or activities of the state governments. This doctrine has not been applied to other powers of the Congress. *United States* v. *California,* 297 U. S. 175, 184–185. Indeed, since the Constitution creates a federal government primarily by granting certain plenary powers and withholding others, the doctrine applied in the tax cases must necessarily be an exceptional one.

But this exceptional doctrine, even were it applicable, in no way impairs the basic principle that

the question must always be whether or not the power has been granted to the United States. If the powers and rights of the states were made the first inquiry, it would result in an exaggerated form of that "perfect solecism which affirms" that a national government should exist with certain powers, and yet that in the exercise of those powers it should not be supreme" (Story on the Constitution, II, sec. 1837).

The plain meaning of the language of the Tenth Amendment, the circumstances of its adoption, and a century of constitutional litigation support the approach represented by the *Ashwander* and *Jones & Laughlin* opinions. We respectfully submit that it should be adopted in this case. Any other rule must condemn constitutional interpretation to a perpetual servitude to sophistry and contradiction: neither layman nor scholar can ever be expected to contrive a satisfactory touchstone by which to determine what powers granted to the national government may not be exercised because reserved to the states as a power "not delegated to the United States."

B. The Act invades no reserved powers and infringes no sovereign rights of the States

It has been shown that the Act of August 16, 1937, is an exercise of the bankruptcy powers granted to Congress, and that accordingly there can be no question as to the effect of the Tenth Amendment. So, too, there is no occasion in this case to consider whether the plenary bankruptcy

power may be subject to limitations akin to those placed on the taxing power. For, however this may be, the Act contains nothing that can be said to be inconsistent with our dual system of government. This is made plain by a mere reading of the Act; however, to err on the side of caution, we shall detail the provisions which affirmatively insure that there shall be no violation of the rights of the states.[52]

1. In the first place, the proceedings are wholly voluntary. Section 83 (a) extends the privilege of invoking the bankruptcy jurisdiction only to the taxing agency itself. Chapter X contains no provision designed to induce the application for composition or even to influence the taxing agency in its decision. An Act which operates only when the state taxing agency itself freely chooses to take advantage of its provisions hardly can be said to threaten the independence of the states or of their taxing agencies. See *Massachusetts* v. *Mellon*, 262 U. S. 447, 480.

The taxing agency, of course, is subject to the full control of the State, and its powers are only those granted by the State. Unless these powers, expressly or by implication, include authority to

[52] If the Court, notwithstanding the considerations set out in the preceding section, should be of the view that the Tenth Amendment operates as an independent limitation upon the federal powers, it should be noted that these provisions would also serve to establish that the Act of August 16, 1937, contains nothing contrary to that Amendment.

compose its debts and to invoke the jurisdiction of the bankruptcy court, the taxing agency cannot seek the benefit of the Act of August 16, 1937. Not only, therefore, is the choice of the taxing agency wholly voluntary, but it must necessarily be made subject to the provisions of State law.

2. Even after the taxing agency has itself invoked the bankruptcy jurisdiction, the court is without any control over its fiscal affairs or governmental activities. The plan of composition must be prepared by the taxing agency and agreed to by 51 per cent of its creditors before the petition is filed. Section 83 (c). The power of the judge is limited to the choice between approval of the plan filed or dismissal of the petition; changes or modifications must be initiated by the taxing agency and its petitioners. Section 83 (e). The court has no power to alter tax rates, compel the collection of taxes, rearrange the debt structure, or to direct or influence the governmental functions of the taxing agency. Its only powers are to approve or reject the plan offered to it by the taxing agency, supervise the details of the proceeding, and, if 66⅔ per cent of the creditors have accepted the plan of composition, to compel its acceptance by the minority creditors. As this Court has said, in *Cumberland Glass Co.* v. *De Witt*, 237 U. S. 447, 453, composition "is a proceeding wholly voluntary on both sides * * *. Except for this coercion of the minority, the inter-

vention of the court of bankruptcy would hardly be necessary." [53]

If the plan is approved, the taxing agency has obtained a sorely needed benefit; if it is disapproved, the taxing agency is in the position it was before its petition was filed. In neither case have its affairs been subjected to any control or interference by the court. It would be difficult to contrive a statute which offered federal aid to the state taxing agencies so completely untouched by correlative duties or liabilities on the part of the taxing agencies. The act subjects only the minority creditors to any form of involuntary control or regulation. This impact on the creditor is wholly immaterial to the effect of the act on the taxing agency.

It must be remembered that the typical taxing agency to which the Act of August 16, 1937, is applicable is fully subject to suit and that federal courts, in the exercise of their general equity powers, have appointed receivers to collect the taxes and to control the revenues of taxing agencies subject by statute to similar control in the state courts (*supra*, pp. 39–41). The bankruptcy proceedings, on the other hand, may be initiated only by the taxing agency and the court is carefully restricted

[53] This statement was quoted by the Court from *In re Lane*, 125 Fed. 772 (D. Mass.), with the preface that "the nature of composition proceedings is nowhere better stated than by Judge Lowell."

in the powers which it may exercise over the debtor in the course of the proceedings. The control of the court is negligible, when compared to the sweeping powers which federal equity courts, with the sanction of this Court, have exercised over similar state taxing agencies. To hold, as appellees ask, that the receivership proceeding lies within the federal powers, but that the bankruptcy proceeding does not, would have extraordinary implications. Such a decision would seem necessarily to be based upon either of two propositions: that a federal power possessed by the courts cannot be exercised if Congress authorizes it, or, alternatively, that the general power to decide controversies between citizens of different states reaches farther into the field of insolvency than does the specific power to legislate "on the subject of bankruptcies." It requires no argument to demonstrate that either of these premises is completely untenable. It must follow that the conclusion, which can be based on no other proposition, is equally unsound.

3. There can, we believe, be no thought that the taxing agency surrenders any of its rights and powers to the bankruptcy court. But Congress, in its solicitude to guard against any thought that it had invaded the sovereignty of the states, has gone farther and has ensured that the federal court should not be an unwitting partner of the taxing agency in any violation of state law. The court

can approve the plan of composition only "if satisfied that * * * the petitioner is authorized by law to take all action necessary to carry out the plan" Section 83 (e).

Moreover, under Section 83 (c), the judge can enter no order in the course of the proceeding which would interfere with any political or governmental power of the petitioner, with any property or revenues necessary for essential governmental purposes, or unless the plan of composition so provides, with any income-producing property. To make the matter clear beyond doubt, Congress has provided in Section 83 (i) that:

> Nothing contained in this chapter shall be construed to limit or impair the power of any State to control, by legislation or otherwise, any municipality or any political subdivision of or in such State in the exercise of its political or governmental powers, including expenditures therefor.

4. Such is the structure of the federal act. It seems plain beyond argument that no substantial impairment of state sovereignty can be claimed. But, if there were doubt, that doubt has been removed by the State of California itself. By Act of September 20, 1934 (Laws of 1934, Ex. Sess., c. 4, sec. 3), the legislature provided:

> Any taxing district in the State of California is hereby authorized to file the petition mentioned in the Federal Bankruptcy

> Statute, and to incur and pay the expenses thereof and any and all other expenses necessary or incidental to the consummation of the plan of readjustment contemplated in such petition or as the same may be modified from time to time.[54]

The State of California has itself determined that the federal bankruptcy power does not threaten its sovereignty when applied to the taxing districts of the State. We submit that the appellees accordingly should not be heard to argue for a supposed immunity which the State itself has renounced.

More generally, it is a consideration of much weight that sixteen States have expressly sanctioned some or all of their subordinate taxing agencies to invoke the aid of the federal bankruptcy courts.[55] Since Chapter X has been in force only

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[54] The statute adopts the definition of "taxing districts" given by Chapter IX of the Bankruptcy Act, and defines "Federal Bankruptcy Act" as Chapter IX "and acts amendatory and supplementary thereto, as the same may be amended from time to time." Whether this act is applicable to Chapter X is a question of state law not necessary to be decided at this time. The fact that the State did not consider Chapter IX to be an invasion of the sovereignty means, *a fortiori*, that Chapter X is not so considered.

[55] Alabama, L. 1935, No. 197 (county, city, or town); Arizona, L. 1935, c. 17 (taxing district); Arkansas, L. 1937, Act 212, sec. 12 (levee and drainage districts); California, L. 1934 (Ex. Sess.), c. 4 (taxing districts); Florida, L. 1933, c. 15878 (municipalities, taxing districts, and political subdivisions); Iowa, L. 1935, c. 90 (levee and drainage districts); Louisiana, L. 1935 (Ex. Sess.), pp. 529, 532 (politi-

since August 16, 1937, no state has yet authorized proceedings specifically under this Chapter.[56] Four states which had not passed statutes giving express consent to proceedings under Chapter IX joined in the brief *amicus curiae* on the petition for rehearing in *Ashton* v. *Cameron County District,* 298 U. S. 513.[57] Thus, some twenty states have, in one form or another, indicated that the extension of the federal bankruptcy power to their political subdivisions contains no threat of impairing their

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cal subdivisions, municipalities, etc.); Michigan, L. 1935, No. 53 (municipality or other political subdivision); Minnesota, L. 1935, c. 119, sec. 3 (municipality); see also Minnesota Laws of 1937, c. 104; New Jersey, L. 1935, c. 190 (municipality); Ohio, L. 1934 (Spec. Sess.), p. 348 (municipalities and other taxing subdivisions); Oklahoma, L. 1935, p. 123 (municipalities or other political subdivisions); Oregon, L. 1935, c. 43 (irrigation or drainage district); Pennsylvania, L. 1935, No. 146 (political subdivision); Texas, L. 1935, c. 107 (municipalities, taxing districts, and political subdivisions); Washington, L. 1935, c. 143 (taxing districts).

The statutes of Arkansas, Florida, Iowa, Louisiana, Oklahoma, and Texas are applicable to any federal bankruptcy law; those of Arizona, California, Minnesota, New Jersey, Oregon, Pennsylvania, and Washington to Chapter IX "and acts amendatory or supplementary thereto"; and those of Alabama, Michigan, and Ohio to Chapter IX only.

[56] Minnesota Laws of 1937, c. 104, however, in general terms authorizes its municipalities to enter into debt adjustment agreements with its creditors.

[57] No. 859, October Term, 1935. Ten states joined in the brief; of these, Colorado, Mississippi, Missouri, and New Mexico had not by statute consented to the bankruptcy proceedings.

sovereignty. No state has forbidden its subdivisions to seek the aid of the bankruptcy court. Respondents, therefore, ask to have this Court brush aside not only the judgment of Congress but also that of twenty states. The Government submits that, whatever the nature of the guardianship of state sovereignty which this Court should exercise, it is not one which should disregard the great weight to be given the considered judgment of both the nation and the states.

The bankruptcy power cannot, we believe, properly be analogized to the taxing power. That power, by its nature and by its historical development, is to be distinguished from the plenary powers of Congress, *United States* v. *California*, 297 U. S. 175, 184–185; cf. *Board of Trustees* v. *United States*, 289 U. S. 48, and the Constitution grants "plenary power to Congress over the whole subject of bankruptcies," *Hanover National Bank* v. *Moyses*, 186 U. S. 181, 187. But even if the bankruptcy power were subject to all of the restrictions placed on the taxing power, respondents have no ground on which to assail the Act of August 16, 1937. In the first place, the State of California has consented to its operation. This removes all objection based upon a supposed invasion of the sovereignty of the State. *Baltimore National Bank* v. *State Tax Commission*, 297 U. S. 209. In the second place, the restrictions placed upon the taxing power

do not extend beyond the necessity of maintaining the dual system of government. *National Bank* v. *Commonwealth,* 9 Wall. 353, 362; *Helvering* v. *Powers,* 293 U. S. 214, 224–225. We have shown that this Act contains no possibility whatever of destroying the necessary independence of the states.

5. In result, the Act of August 16, 1937, offers assistance only if the taxing agency seeks it. It gives the bankruptcy court no control over the agency after its jurisdiction is invoked. It insures that no law or power of the state is impaired. It offers only two things that the taxing agency could not secure by contract with its creditors: (1) a regularized procedure, and (2) a means by which to compel minority creditors to accept reasonable composition. Neither of these in any manner infringes the sovereignty of the states. The power to compel acceptance by minority creditors is the heart of the bankruptcy power and, it is to be noted, operates not on the taxing agency but upon its creditors. It may be assumed that the minority creditors are coerced by proceedings under Chapter X. But against this the Constitution offers no protection: coercion of the minority creditors is the heart of the bankruptcy power. This power is not to be vitiated by the minority creditors' attempt to translate their coercion into that of the states or their taxing agencies.

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C. *Ashton* v. *Cameron County District* is inapplicable

Respondents, we suppose, will rely chiefly upon *Ashton* v. *Cameron County District,* 298 U. S. 513. In that case this Court held the original bankruptcy act for the relief of state taxing districts, Chapter IX, to be unconstitutional. The decision, as we read it, was placed chiefly upon the ground that Chapter IX so interfered with the powers of the states and their political subdivisions that "they are no longer free to manage their own affairs; the will of Congress prevails over them; although inhibited, the right to tax might be less sinister. And really the sovereignty of the State, so often declared necessary to the Federal system, does not exist" (p. 531). The Government submits, first, that the *Ashton* case is inapplicable to the Act of August 16, 1937, Chapter X. If, however, the Court should consider the decision to be so broad as to cover the present Act, it is respectfully urged that the rule of the *Ashton* case be reconsidered and modified or overruled.

1. The circumstances leading up to the enactment of Chapter X are closely analogous to those relating to the enactment of the second Frazier-Lemke Act. There the original provisions for the relief of farmers had been held unconstitutional in *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555. This Court in *Wright* v. *Vinton Branch,* 300 U. S. 440, sustained the new act and gave much weight (p. 457) to the fact that—

> The measures received careful consideration before the committees of the House and the Senate. Amendments were made there with a view to ensuring the constitutionality of the legislation recommended. The Congress concluded, after full discussion, that the bill, as enacted, was free from the objectionable features which had been held fatal to the original Act.

Chapter X was drafted in the light of the *Ashton* case. Here, too, a Congressional committee held hearings devoted both to the need for legislation of this sort and to the constitutional limitations announced by this Court.[58] The Judiciary Committee of the House submitted a carefully considered report (H. Rept. No. 517, 75th Cong., 1st Sess.) which the Senate Judiciary Committee adopted (Sen. Rpt. No. 911, 75th Cong., 1st Sess.). In this report (printed in full as Appendix D to appellant's brief in No. 772) the Committee states:

> The bill here recommended for passage expressly avoids any restriction on the powers of the States or their arms of government in the exercise of their sovereign rights and duties. No interference with the fiscal or governmental affairs of a political subdivision is permitted. The taxing agency itself is the only instrumentality

[58] Hearings Before Subcommittee on Bankruptcy and Reorganization, Committee on the Judiciary, House of Representatives (H. R. 2505, 2506, 5403, 5969), 75th Cong., 1st Sess.

which can seek the benefits of the proposed legislation. No involuntary proceedings are allowable, and no control or jurisdiction over that property and those revenues of the petitioning agency necessary for essential governmental purposes is conferred by the bill.

* * * * *

There is no hope for relief through statutes enacted by the States, because the Constitution forbids the passing of State laws impairing the obligations of existing contracts. Therefore, relief must come from Congress, if at all. The committee are not prepared to admit that the situation presents a legislative no-man's land. * * * It is the opinion of the committee that the present bill removes the objections to the unconstitutional statute, and gives a forum to enable those distressed taxing agencies which desire to adjust their obligations and which are capable of reorganization, to meet their creditors under necessary judicial control and guidance and free from coercion, and to effect such adjustment on a plan determined to be mutually advantageous.

The bill was fully considered on the floor of each House of Congress, both as to the necessity of the legislation and as to its constitutionality under the *Ashton* case (81 Cong. Rec. 6311–6329, 8383, 8541–8550). The measure passed the House by a vote of 123–16, and the Senate without record vote (81 Cong. Rec. 6329, 8550). The Act of August 16,

1937, accordingly is supported by a presumption of constitutionality of perhaps uncommon weight; certainly the deliberate opinion of Congress that notwithstanding the *Ashton* case this legislation is constitutional cannot, as respondents would have it, lightly be disregarded.

2. The judgment of the Congress that the *Ashton* case is inapplicable to this Act is supported by important differences between the two acts. Of these, perhaps the most basic is the contrast between the debt readjustment provisions of Chapter IX and the composition provided in Chapter X.

Chapter IX of the Bankruptcy Act, added by the Act of May 24, 1934, c. 345, 48 Stat. 798, provided in Section 80 (a) that any municipality or political subdivision could file a petition for "readjustment" of its debts. The bankruptcy court, on approving the petition, was invested with significantly wider powers than is the case under Chapter X. It could require the taxing district "to file such schedules and submit such other information as may be necessary to disclose the conduct of the affairs of the taxing district and the fairness of any proposed plan." Section 80 (c) (3). The bankruptcy court could, with the approval of the district, "direct the rejection of contracts of the taxing district executory in whole or in part." Section 80 (c) (5). The court might "require the taxing district to open its books, records, and files to the inspection of any creditors,"

Section 80 (c) (7). The order of the court, approving the plan of readjustment, was binding not only on the creditors but also on the taxing district. Section 80 (g).

In addition, Chapter IX contained general provisions which, when construed in the light of the Court's opinion in the *Ashton* case, embraced a wide congeries of powers which might have been thought to endanger the States' control of their political subdivisions. The Court there declared the states "are no longer free to manage their own affairs", and that to sustain the act would mean that the federal government "may impose its will and impair state powers." (298 U. S. at 531.) This fear as to the scope of the federal power must have related to Section 80 (b) (2), under which the "plan of readjustment" could include "such other provisions and agreements, not inconsistent with this chapter, as the parties may desire." Since the term readjustment has connotations perhaps as broad as reorganization or rearrangement, it might have been felt, for example, that new means of raising revenues or new modes of taxation could be devised in the bankruptcy court irrespective of state authority.

Not one of these elements of control by the Federal court is present in proceedings under Chapter X. The taxing agency here retains a more complete independence of the bankruptcy court than would have been the case under Chapter IX. That

chapter was modeled upon Section 77 of the Bankruptcy Act. *Cameron County District* v. *Ashton,* 81 F. (2d) 905, 907–908 (C. C. A. 5th). Accordingly, and in view of the broader powers conferred on the court by Chapter IX, it is much closer than is Chapter X to the more typical bankruptcy proceedings in which the bankruptcy court is given a plenary jurisdiction over the debtor's property wherever found. See *Continental Bank* v. *Rock Island Ry.,* 294 U. S. 648, 683; *cf. Straton* v. *New,* 283 U. S. 318, 321; *Acme Harvester Co.* v. *Beekman Lumber Co.,* 222 U. S. 300, 307; *Mueller* v. *Nugent,* 184 U. S. 1, 14.

Chapter X, on the other hand, makes provision not for a readjustment of the debts but for their composition. It derives from the Act of 1874 (c. 390, 18 Stat. 183), which became Section 12 of the Bankruptcy Act of 1898 (c. 541, 30 Stat. 549). Under these provisions it has become settled that composition, while a proceeding in bankruptcy, *Wilmot* v. *Mudge,* 103 U. S. 217, 219, is a wholly voluntary proceeding so far as the debtor and the majority creditors are concerned, and one which is entirely contractual rather than coercive in nature. *Cumberland Glass Co.* v. *De Witt,* 237 U. S. 447, 453–454; *Nassau Works* v. *Brightwood Co.,* 265 U. S. 269, 271; *Myers* v. *International Trust Co.,* 273 U. S. 380, 383; *Louisville Bank* v. *Radford,* 295 U. S. 555, 585. Thus, a composition proceeding, which in substance is no more than a contract be-

tween the debtor and his creditors, can offer no interference with the state taxing agencies even though a readjustment proceeding might be thought to invest the federal court with powers incompatible with the independence of the states."[59]

3. So far as this case is concerned, there is another important distinction from the *Ashton* case. The Cameron County Water Improvement District Number One, respondent in that case, was held to be a political subdivision of the state (298 U. S. at 527–528). Indeed, the Act was in terms applicable only to political subdivisions. *Southern Sierras Power Co.* v. *Imperial Irrigation District,* 87 F. (2d) 355, 356 (C. C. A. 9th). The control over its affairs given to the bankruptcy court by Chapter IX was accordingly held to be the equivalent of a similar control over the affairs of the state (298 U. S. at 531). But in the case at bar the Lindsay-Strathmore Irrigation District is not a "political subdivision" of the State of California, and Chapter X is carefully constructed to permit a separable operation.

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[59] There is a statement in *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648, 672, that the plan of reorganization contemplated by Section 77 "cannot be distinguished in principle from the composition which creditors authorized by the act of * * * 1874." This was directed toward the constitutionality of the proceeding as affected by the fact that it did not look toward an adjudication of bankruptcy. The statement obviously has no application where the question is the extent of control exercised over the debtor.

The status of irrigation districts has been the object of a rather refined analysis in the local law.[60] It is clear, on the one hand, that the districts are "public" corporations or agencies, performing limited governmental functions. *In re Madera Irrigation District,* 92 Cal. 296, 317 (holding the Act constitutional); *Lindsay-Strathmore Irrigation District* v. *Superior Court,* 182 Cal. 315 (granting the statutory privilege of a "public agency" to disqualify a judge); *Nissen* v. *Cordua Irrigation District,* 204 Cal. 542, 544, and *Morrison* v. *Smith Bros., Inc.,* 211 Cal. 36, 40 (no tort liability for negligence of agents); *Sutro Heights Land Co.* v. *Merced Irrigation District,* 211 Cal. 670, 703 (no mandate to compel a public corporation to spend money); *Box* v. *Young,* 219 Cal. 243 (its papers are public documents within the rules of evidence).

On the other hand, it is equally clear that the irrigation districts fall considerably short of the status of political subdivisions. The State Constitution, in Section 14 of Article I, distinguishes between the State, its political subdivisions, and districts

[60] They are organized under the Laws of 1897, p. 254, as amended; Deering's General Statutes, Act No. 3854. In addition to the power of imposing special assessments, they may condemn land (Secs. 15, 16); they may require banks to take security (Sec. 27b); their organization is under the control of the county supervisors and the state engineer (Sec. 2); their bond issuance is under the control of a state commission (Sec. 30a *et seq.*); their officers are elected by the voters in general (Sec. 8) and must give official bonds Sec. 19a). The districts are, of course, subject to suit (Sec. 15b).

such as these; the power of eminent domain is given to each separately. In *San Diego* v. *Linda Vista Irrigation District,* 108 Cal. 189, the District was allowed to assess pueblo lands of the city; it was not a forbidden "tax" because the district was (p. 193)—

> a local organization to secure a local benefit. * * * the state, or the public at large derives no direct benefit, but only that reflex benefit which all local improvements confer.

See *Bettencourt* v. *Industrial Accident Commission,* 175 Cal. 559, 561, declaring that the similar reclamation districts were not "public corporations", covered by the Workmen's Compensation Act, because "they possess no political or governmental powers." Accordingly, the irrigation districts have repeatedly been denied the status of a municipal corporation or a political subdivision. *Turlock Irrigation District* v. *White,* 186 Cal. 183, 187 (taxability of certain property of "municipal corporations" inapplicable); *Crawford* v. *Imperial Irrigation District,* 200 Cal. 318, 325–326 (may employ agents to influence legislation); *La Mesa Irrigation District* v. *Hornbeck,* 216 Cal. 730, 734–735 (tax lien inferior to those of counties and municipalities); *Wood* v. *Imperial Irrigation District,* 216 Cal. 748, 753 (cannot take security for bank deposits).

Thus, while the irrigation district exercises a narrowly restricted group of governmental powers,

the California courts have repeatedly announced that it "is not a political subdivision of the state or county, or a political subsidiary at all" (*Wood* v. *Imperial Irrigation District,* 216 Cal. 748, 753). If the State of California, for its domestic purposes, itself refuses to give to the District all of the investiture of the sovereignty of the State, we submit that this Court should not invalidate an Act of Congress because of a supposed interference with the sovereignty of California. Even if the Act of August 16, 1937, should be thought to contain a threat to state sovereignty, in any of its applications, it cannot properly be said to threaten the State through its application to a taxing agency which the State itself has declared not to be entitled to share the full scope of its sovereign status.

The Act of August 16, 1937, is accordingly valid as applied in the case at bar, whatever extension be given the rule of the *Ashton* case. There is no occasion to consider its validity in other circumstances or in other applications. Section 81 confers jurisdiction over six general types of taxing agencies.[61] Immediately following this classification of taxing agencies, Section 81 provides:

[61] They may be summarized as: (1) agricultural improvement districts; (2) sanitary and paving districts; (3) road improvement districts; (4) school districts; (5) port improvement districts; (6) any city, town, village, borough, township, or other municipality.

It may be noted that parishes and counties, included under Chapter IX, are omitted from the sixth classification; this was done because Congress considered them to be more truly

> That if any provision of this chapter, or the application thereof to any such taxing agency or district or class thereof or to any circumstance, is held invalid, the remainder of the chapter, or the application of such provision to any other or different taxing agency or district or class thereof or to any other or different circumstances, shall not be affected by such holding.

It is, therefore, perfectly plain that Congress intended Chapter X to stand so far as it covered any taxing agency to which it could constitutionally be applied. It follows, since the Lindsay-Strathmore Irrigation District is not a political subdivision of the State, that the judgment must be reversed whatever the validity of the Act as applied to taxing agencies which under local law share enough of the powers and immunities of the sovereign to be termed political subdivisions.

4. It has been shown that the Act of August 16, 1937, and the case at bar are not controlled by the *Ashton* case. Whether or not that decision be sound, it plainly should not be given the very considerable extension which would be required to sustain the judgment of the court below.

However, we recognize that the opinion is couched in broad terms and might possibly be construed as intended to be applicable to all bankruptcy legislation which affected any taxing agency

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political subdivisions of the states than the remaining corporations. See 81 Cong. Rec. 6326.

of the state. If the Court should be of the view that such is the scope to be given the *Ashton* opinion, the Government respectfully asks that it be reexamined and overruled.[62]

It has been shown that the Act of August 16, 1937, is urgently necessary to aid sorely pressed taxing agencies and their remediless creditors (*supra,* pp. 14–20). It has been shown that it is a valid exercise of the bankruptcy powers conferred on Congress by the Constitution (*supra,* pp. 25–43). It has been shown that the Constitution correlatively denies to the states the power to deal with this compelling need (*supra,* pp. 20–22). It has been shown that the Tenth Amendment has no independent force to dry up powers otherwise possessed by the Federal Government (*supra,* pp. 47–66). It has been shown that the Act of August 16, 1937, contains no colour of intereference with or dictation of the affairs of the taxing agencies which seek its benefits (*supra,* pp. 67–75). It seems to the Government that a decision that the Act is nonetheless

[62] It may be noted that Mr. Sumners, Chairman of the House Judiciary Committee, frankly stated that the sixth classification of taxing agencies (see footnote 61) implied proceedings which would be unconstitutional under the *Ashton* case. He felt, however, that it was not only the right but the duty of the Congress to present the question once more to this Court, since the decision, if allowed to stand, threatened a grave impairment of the powers of the States, in that it forbade them to authorize its political subdivisions to enter into bankruptcy proceedings. 81 Cong. Rec. 6314, 6327. See also, Mr. Chandler, 81 Cong. Rec. 6323.

unconstitutional might threaten a catastrophic effect, not only upon the insolvent taxing agencies and their creditors but also upon the constitutional development of the nation. A federated nation implies the distribution, not the destruction of governmental powers. If the *Ashton* case compels a decision to the contrary, it should be overruled.

CONCLUSION

For the reasons which we have set out, the Act of August 16, 1937, is a valid exercise of the bankruptcy powers granted to Congress by the Constitution. It is, therefore, respectfully submitted that the judgment of the court below should be reversed.

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MARCH 1938.

APPENDIX

Act of August 16, 1937, c. 657, 50 Stat. 653; U. S. C., Title 11, c. X:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of July 1, 1898, entitled "An Act to establish a uniform system of bankruptcy throughout the United States", as approved July 1, 1898, and Acts amendatory thereof and supplementary thereto be, and they are hereby, amended by adding thereto a new chapter, to be designated "chapter X", to be and read as follows:

"CHAPTER X

"ADDITIONAL JURISDICTION

"SEC. 81. This Act and proceedings thereunder are found and declared to be within the subject of bankruptcies and, in addition to the jurisdiction otherwise exercised, courts of bankruptcy shall exercise original jurisdiction as provided in this chapter for the composition of indebtedness of, or authorized by, any of the taxing agencies or instrumentalities hereinafter named, payable (a) out of assessments or taxes, or both, levied against and constituting liens upon property in any of said taxing agencies or instrumentalities, or (b) out of property acquired by foreclosure of any such assessments or taxes or both, or (c) out of income derived by such taxing agencies or instrumentalities from the sale of water or power or both, or (d)

from any combination thereof; (1) Drainage, drainage and levee, levee, levee and drainage, reclamation, water, irrigation, or other similar districts, commonly designated as agricultural improvement districts or local improvement districts, organized or created for the purpose of constructing, improving, maintaining, and operating certain improvements or projects devoted chiefly to the improvement of lands therein for agricultural purposes; or (2) local improvement districts such as sewer, paving, sanitary, or other similar districts, organized or created for the purposes designated by their respective names; or (3) local improvement districts such as road, highway, or other similar districts, organized or created for the purpose of grading, paving, or otherwise improving public streets, roads, or highways; or (4) public-school districts or public-school authorities organized or created for the purpose of constructing, maintaining, and operating public schools or public-school facilities; or (5) local improvement districts such as port, navigation, or other similar districts, organized or created for the purpose of constructing, improving, maintaining, and operating ports and port facilities; or (6) any city, town, village, borough, township, or other municipality: *Provided, however,* That if any provision of this chapter, or the application thereof to any such taxing agency or district or class thereof or to any circumstance, is held invalid, the remainder of the chapter, or the application of such provision to any other or different taxing agency or district or class thereof or to any other or different circumstances, shall not be affected by such holding.

"DEFINITION

"SEC. 82. The following terms as used in this chapter, unless a different meaning is plainly required by the context, shall be construed as follows:

"That the term 'petitioner' shall include any taxing agency or instrumentality referred to in section 81 of this chapter.

"The term 'security' shall include bonds, notes, judgments, claims, and demands, liquidated or unliquidated, and other evidences of indebtedness, either secured or unsecured, and certificates of beneficial interest in property.

"The term 'creditor' means the holder of a security or securities.

"Any agency of the United States holding securities acquired pursuant to contract with any petitioner under this chapter shall be deemed a creditor in the amount of the full face value thereof.

"The term 'security affected by the plan' means a security as to which the rights of its holder are proposed to be adjusted or modified materially by the consummation of a composition agreement.

"The singular number includes the plural and the masculine gender the feminine.

"COMPOSITIONS

"SEC. 83. (a) Any petitioner may file a petition hereunder stating that the petitioner is insolvent or unable to meet its debts as they mature and that it desires to effect a plan for the composition of its debts. The petition shall be filed with the court in whose territorial jurisdiction the petitioner or the major part thereof is located, and, in the case of any unincorporated tax or special-as-

sessment district having no officials of its own, the petition may be filed by its governing authority or the board or body having authority to levy taxes or assessments to meet the obligations to be affected by the plan of composition. The petition shall be accompanied by payment to the clerk of a filing fee of $100, which shall be in lieu of the fees required to be collected by the clerk under other applicable chapters of the Uniform Bankruptcy Act of 1898, as amended. The petition shall state that a plan of composition has been prepared, is filed and submitted with the petition, and that creditors of the petitioner owning not less than 51 per centum in amount of the securities affected by the plan (excluding, however, any such securities owned, held, or controlled by the petitioner), have accepted it in writing. There shall be filed with the petition a list of all known creditors of the petitioner, together with their addresses so far as known to petitioner, and description of their respective securities showing separately those who have accepted the plan of composition, together with their separate addresses, the contents of which list shall not constitute admissions by the petitioner in a proceeding under this chapter or otherwise. Upon the filing of such a petition the judge shall enter an order either approving it as properly filed under this chapter, if satisfied that such petition complies with this chapter and has been filed in good faith, or dismissing it, if not so satisfied.

"The 'plan of composition,' within the meaning of this chapter, may include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through issu-

ance of new securities of any character, or otherwise, and may contain such other provisions and agreements not inconsistent with this chapter as the parties may desire.

"No creditor shall be deemed to be affected by any plan of composition unless the same shall affect his interest materially, and in case any controversy shall arise as to whether any creditor or class of creditors shall or shall not be affected, the issue shall be determined by the judge, after hearing, upon notice to the parties interested.

"For all purposes of this chapter any creditor may act in person or by an attorney or a duly authorized agent or committee. Where any committee, organization, group, or individual shall assume to act for or on behalf of creditors, such committee, organization, group, or individual shall first file with the court in which the proceeding is pending a list of the creditors represented by such committee, organization, group, or individual, giving the name and address of each such creditor, together with a statement of the amount, class, and character of the security held by him, and attach thereto copies of the instrument or instruments in writing signed by the owners of the bonds showing their authority, and shall file with the list a copy of the contract or agreement entered into between such committee, organization, group, or individual and the creditors represented by it or them, which contract shall disclose all compensation to be received, directly or indirectly, by such committee, organization, group, or individual, which agreed compensation shall be subject to modification and approval by the court.

"(b) Upon approving the petition as properly filed, or at any time thereafter, the

judge shall enter an order fixing a time and place for a hearing on the petition, which shall be held within ninety days from the date of said order, and shall provide in the order that notice shall be given to creditors of the filing of the petition and its approval as being properly filed, and of the time and place for the hearing. The judge shall prescribe the form of the notice, which shall specify the manner in which claims and interests of creditors shall be filed or evidenced, on or before the date fixed for the hearing. The notice shall be published at least once a week for three successive weeks in at least one newspaper of general circulation published within the jurisdiction of the court, and in such other paper or papers having a general circulation among bond dealers and bondholders as may be designated by the court, and the judge may require that it may be published in such other publication as he may deem proper. The judge shall require that a copy of the notice be mailed, postage prepaid, to each creditor of the petitioner named in the petition at the address of such creditor given in the petition, or, if no address is given in the petition for any creditor and the address of such creditor cannot with reasonable diligence be ascertained, then a copy of the notice shall be mailed, postage prepaid, to such creditor addressed to him as the judge may prescribe. All expense of giving notice as herein provided shall be paid by the petitioner. The notice shall be first published, and the mailing of copies thereof shall be completed at least sixty days before the date fixed for the hearing.

"At any time not less than ten days prior to the time fixed for the hearing, any cred-

itor of the petitioner affected by the plan may file an answer to the petition controverting any of the material allegations therein and setting up any objection he may have to the plan of composition. The judge may continue the hearing from time to time if the percentage of creditors required herein for the confirmation of the plan shall not have accepted the plan in writing, or if for any reason satisfactory to the judge the hearing is not completed on the date fixed therefor. At the hearing, or a continuance thereof, the judge shall decide the issues presented and unless the material allegations of the petition are sustained, shall dismiss the proceeding. If, however, the material allegations of the petition are sustained, the judge shall classify the creditors according to the nature of their respective claims and interests: Provided, however, That the holders of all claims, regardless of the manner in which they are evidenced, which are payable without preference out of funds derived from the same source or sources shall be of one class. The holders of claims for the payment of which specific property or revenues are pledged, or which are otherwise given preference as provided by law, shall accordingly constitute a separate class or classes of creditors.

"At the hearing, or a continuance thereof, the judge may refer any matters to a special master for consideration, the taking of testimony, and a report upon special issues, and may allow reasonable compensation for the services performed by such special master, and the actual and necessary expenses incurred in connection with the proceeding, including compensation for services rendered and expenses incurred in obtaining

the deposit of securities and the preparation of the plan, whether such work may have been done by the petitioner or by committees or other representatives of creditors, and may allow reasonable compensation for the attorneys or agents of any of the foregoing, and may apportion the amount so determined among the parties to the proceeding as may be just: *Provided, however,* That no fees, compensation, reimbursement or other allowances for attorneys, agents, committees, or other representatives of creditors shall be assessed against the petitioner or paid from any revenues, property, or funds of the petitioner except in the manner and in such sums, if any, as may be provided for in the plan of composition. An appeal may be taken from any other making such determination or award to the United States Circuit Court of Appeals for the circuit in which the proceeding under this chapter is pending, independently of other appeals which may be taken in the proceeding, and such appeal shall be heard summarily.

"On thirty days' notice by any creditor to petitioner, the judge, if he finds that the proceeding has not been prosecuted with reasonable diligence, or that it is unlikely that the plan will be accepted by said proportion of creditors, may dismiss the proceeding.

"(c) Upon entry of the order fixing the time for the hearing, or at any time thereafter, the judge may upon notice enjoin or stay, pending the determination of the matter, the commencement or continuation of suits against the petitioner, or any officer or inhabitant thereof, on account of the securities affected by the plan, or to enforce any lien or to enforce the levy of taxes or assess-

ments for the payment of obligations under any such securities, or any suit or process to levy upon or enforce against any property acquired by the petitioner through foreclosure of any such tax lien or special assessment lien, except where rights have become vested, and may enter an interlocutory decree providing that the plan shall be temporarily operative with respect to all securities affected thereby and that the payment of the principal or interest, or both, of such securities, shall be temporarily postponed or extended or otherwise readjusted in the same manner and upon the same terms as if such plan had been finally confirmed and put into effect, and upon the entry of such decree the principal or interest, or both, of such securities which have otherwise become due, or which would otherwise become due, shall not be or become due or payable, and the payment of all such securities shall be postponed during the period in which such decree shall remain in force, but shall not, by any order or decree, in the proceeding or otherwise, interfere with (a) any of the political or governmental powers of the petitioner; or (b) any of the property or revenues of the petitioner necessary for essential governmental purposes; or (c) any income-producing property, unless the plan of composition so provides.

"(d) The plan of composition shall not be confirmed until it has been accepted in writing, by or on behalf of creditors holding at least two-thirds of the aggregate amount of claims of all classes affected by such plan and which have been admitted by the petitioner or allowed by the judge, but excluding claims owned, held, or controlled by the petitioner: *Provided, however,* That it shall not

be requisite to the confirmation of the plan that there be such acceptance by any creditor or class of creditors (a) whose claims are not affected by the plan; or (b) if the plan makes provision for the payment of their claims in cash in full; or (c) if provision is made in the plan for the protection of the interests, claims, or lien of such creditors or class of creditors.

"(e) At the conclusion of the hearing, the judge shall make written findings of fact and his conclusions of law thereon, and shall enter an interlocutory decree confirming the plan if satisfied that (1) it is fair, equitable, and for the best interests of the creditors and does not discriminate unfairly in favor of any creditor or class of creditors; (2) complies with the provisions of this chapter; (3) has been accepted and approved as required by the provisions of subdivision (d) of this section; (4) all amounts to be paid by the petitioner for services or expenses incident to the composition have been fully disclosed and are reasonable; (5) the offer of the plan and its acceptance are in good faith; and (6) the petitioner is authorized by law to take all action necessary to be taken by it to carry out the plan. If not so satisfied, the judge shall enter an order dismissing the proceeding.

"Before a plan is confirmed, changes and modifications may be made therein, with the approval of the judge after hearing upon such notice to creditors as the judge may direct, subject to the right of any creditor who shall previously have accepted the plan to withdraw his acceptance, within a period to be fixed by the judge and after such notice as the judge may direct, if, in the opinion of the judge, the change or modification will be materially adverse to the interest of such

creditor, and if any creditor having such right of withdrawal shall not withdraw within such period, he shall be deemed to have accepted the plan as changed or modified: *Provided, however,* That the plan as changed or modified shall comply with all the provisions of this chapter and shall have been accepted in writing by the petitioner. Either party may appeal from the interlocutory decree as in equity cases. In case said interlocutory decree shall prescribe a time within which any action is to be taken, the running of such time shall be suspended in case of an appeal until final determination thereof. In case said decree is affirmed, the judge may grant such time as he may deem proper for the taking of such action.

"(f) If an interlocutory decree confirming the plan is entered as herein provided, the plan and said decree of confirmation shall become and be binding upon all creditors affected by the plan, if within the time prescribed in the interlocutory decree, or such additional time as the judge may allow, the money, securities, or other consideration to be delivered to the creditors under the terms of the plan shall have been deposited with the court or such disbursing agent as the court may appoint or shall otherwise be made available for the creditors. And thereupon the court shall enter a final decree determining that the petitioner has made available for the creditors affected by the plan the consideration provided for therein and is discharged from all debts and liabilities dealt with in the plan except as provided therein, and that the plan is binding upon all creditors affected by it, whether secured or unsecured, and whether or not their claims have been filed or evidenced, and, if filed or evidenced, whether or not al-

lowed, including creditors who have not, as well as those who have, accepted it.

"(g) A certified copy of the final decree, or of any other decree or order entered by the court or the judge thereof, in a proceeding under this chapter, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and the fact that the decree or order was made. A certified copy of an order providing for the transfer of any property dealt with by the plan shall be evidence of the transfer of title accordingly and, if recorded as conveyances are recorded, shall impart the same notice that a deed, if recorded, would impart.

"(h) This chapter shall not be construed as to modify or repeal any prior, existing statute relating to the refinancing or readjustment of indebtedness of municipalities, political subdivisions, or districts: *Provided, however,* That the initiation of proceedings or the filing of a petition under section 80 shall not constitute a bar to the same taxing agency or instrumentality initiating a new proceeding under section 81 thereof.

"(i) Nothing contained in this chapter shall be construed to limit or impair the power of any State to control, by legislation or otherwise, any municipality or any political subdivision of or in such State in the exercise of its political or governmental powers, including expenditures therefor.

"TERMINATION OF JURISDICTION

"SEC. 84. Jurisdiction conferred on any court by section 81 shall not be exercised by such court after June 30, 1940, except in respect of any proceeding initiated by filing a petition under section 83 (a) on or prior to June 30, 1940."

Approved, August 16, 1937.

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